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———— **authority for.**—*See* REGISTRATION ACT (4).

Adverse possession by donee under invalid gift.—*See* HINDU LAW (10).

Agricultural tenant.—*Notice to quit in a month.*—*Bad notice—Darkhast grant—Fraud upon revenue authorities—Grant not binding on Government.*

A notice given to a tenant in possession of an agricultural holding in March to quit in April next (*i. e.*, in a month) is a bad notice.

Seemle, where a darkhast grant is obtained by fraud the proper course for the party affected is to apply to the revenue authorities to cancel the grant and for a grant to himself. A grant obtained by fraud practised upon the revenue authorities will not bind Government and may be revoked or set aside by the revenue authorities.

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Alienation by de facto guardian for necessity, validity.—*See* GUARDIAN AND WARD.

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———— **security for good behaviour, no prosecution.**—*See* MALICIOUS PROSECUTION.

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Arbitration—reference to—death of one party, effect of.—*See* CIVIL PROCEDURE CODE (31).

———— **reference to—when revocable.**—*See* CIVIL PROCEDURE CODE (31).

Assets, due application of.—*See* CIVIL PROCEDURE CODE (22).

Attachment, effect of.—*See* CIVIL PROCEDURE CODE (24).

———— **of grant for maintenance, legality of.**—*See* VIZAGAPATAM AGENCY TRACTS.

Benamidar—Mortgage with consent of real owner—Payment by benamidar—Charge.

Where a benamidar executes with the consent of the real owner a mortgage for a consideration binding upon the real owner, a payment made by the benamidar of the mortgage amount is not an officious and voluntary payment and the benamidar is entitled to a charge upon the property.

Bhugwati Prasad v. Radha Kishen, I. L. R., 15 A. (P. C.) 304 applied and followed.

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<i>Arunachella Chetty v. Meyyappa Chetty</i> ...	I. L. R., 21 M. 21 dissented from.	439	
<i>Asher v. Whitlock</i>	(1865) L. R. 1 Q. B. D. 1 followed.	146	
<i>Ayyadorai Pillai v. Solai Ammal</i>	I. L. R., 24 M. 405 discussed.	359	
<i>Ayyanna v. Nagabhusanam</i>	I. L. R., 16 M. 285 followed.	300	
<i>Bahadur Singh v. Mohar Singh</i>	I. L. R., 24 A. 94 referred to.	323	
<i>Basavayya v. Syed Abbas</i>	I. L. R., 24 M. 20 overruled.	467	
<i>Bhagwanta v. Sukhi</i>	I. L. R., 22 A. 33 followed.	359	
<i>Bhugwati Prasad v. Radhakishen</i>	I. L. R., 15 A. 304 followed.	228	
<i>Bhurs Mal v. Harkishen Das</i>	I. L. R., 24 A. 388 referred to.	308	

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<i>Chinna Sanyasi v. Suriya</i>	I. L. R., 5 M. 196 referred to.		477
<i>Chintamalayya v. Thadi Gangi Reddi</i>	...		I. L. R., 20 M. 80 distinguished.		275
<i>Cooper v. Johnson</i>	2 B. and Ald. 394 referred to.		311
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<i>Eales v. Municipal Commissioners of Madras</i>	...		I. L. R., 14 M. 386 referred to.		426
<i>Frederick Peacock v. Madan Gopal</i>	I. L. R., 29 C. 428 followed.		278
<i>Ganga Das Dey v. Ramjoy Dey</i>	...	...	I. L. R., 12 C. 80 followed.		300
<i>Gangi v. Ramasami</i>	...	...	12 M. L., J. B. 103 approved.		83
<i>Girdhar Damodhar v. Kassigar</i>	...	...	I. L. R., 17 B. 662 approved.		287
<i>Gulab Rai v. Mangli Lall</i>	...	...	I. L. R., 7 A. 42 followed.		300
<i>Guruva v. Subbarayadu</i>	...	...	I. L. R., 18 M. 366 approved.		367
<i>Hurrish Chunder Chowdhry v. Kalisunderi Debi.</i>			I. L. R., 9 C. 482 referred to.		497
<i>Hurro Doyal Roy Chowdhry v. Mahomed Gasi Chowdhry</i>	...	...	I. L. R., 19 C. 699 followed.		479
<i>Imbichumi Nayar v. Lalji Ram Das Sait</i>	...		I. L. R., 24 M. 560 followed.		484
<i>Ismail Ariff v. Mahamed Ghous</i>	...	...	I. L. R., 20 C. 834 followed.		146
<i>Jagadish Bahadur v. Sheo Partab Singh</i>	...		L. R., 28 I. A. 100 explained.		336
<i>Jagampet case</i>	I. L. R., 25 M. 678 considered and explained.		398
<i>Kumewara Pershad v. Rajkumari Rutten Koer...</i>			I. L. R., 200 79. explained.		439, 448

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<i>Krishnaier v. Krishnasamy Aiyar</i>		I. L. R., 26 M. 366 followed.	484
<i>Krishnasami v. Venkatarana</i>		I. L. R., 13 M. 319 referred to.	248
<i>Kuppa v. Dorasami</i>	I. L. R., 6 M. 76 referred to.	341
<i>Lakshmana Chettiar v. Kannammal</i>		I. L. R., 24 M. 185 followed.	237
<i>Lakshmibai v. Rageji</i>	I. L. R. 22 B. 996 referred to.	318
<i>Madan Mohan Lal v. Kanhai Lal</i>		I. L. R., 17 A. 284 followed.	445
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<i>Madhusudandas v. Govinda Pria Chowdhrahi</i>	...			I. L. R., 27 C. 34 followed.	237
<i>Mahomed Zamir v. Abdul Hakim</i>		I. L. R. 12 C. 67 followed.	479
<i>Maharajah of Burdwan v. Tarasundari Debi</i>	...			I. L. R., 9 C. 609 followed.	479
<i>Mangamma v. Timmapaiya</i>		3 M. H. C. R., 131 followed.	139
<i>Mahomed Hamidulla v. Tohurunnissa Bibi</i>	...			I. L. R., 25 C. 155 considered and explained.	308
<i>Muhammad Nawaskhan v. Alamkhan</i>		L. R. 18, I. A. 73 followed.	27
<i>Mustapha Sahib v. Santha Pillai</i>		I. L. R., 5 M. 167 followed.	146
<i>Muthia v. Appasami...</i>	I. L. R.' 13 M. 504 followed.	231
<i>Narayana v. Runga</i>	I. L. R., 15 M. 183 referred to.	341
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<i>Nussericanji Merwanji Panday v. Gordon Subba</i>		I. L. R. 6 B. 286	referred to.	13	
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<i>Quelin v. Moisson</i>	1 Knapp 265	referred to.	287	
<i>Raghunatha Gopal v. Nilu Nathoji</i>	I. L. R., 9 B. 452	followed.	300	
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<i>Raja Furma v. Ravi Furma</i>	I. L. R., 1 M. 235	referred to.	341	
<i>Ramasami v. Venkatrama</i>	L. R., 6 I. A. 196	referred to.	318	
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<i>Ramasami Pattar v. Ohinman Asari</i>	I. L. R., 24 M. 462	followed.	217	
<i>Ram Golam Dobey v. Ayma Begum</i>	12 W. R. C. R. 177	followed.	258	
<i>Rangasami Pillai v. Krishna Pillai</i>	I. L. R., 22 M. 259	treated as overruled.	448	
<i>Ranganayaka Ammal v. K. Venkata Chella-</i> <i>pathy Nayudu</i>	I. L. R., 4 M. 323	followed.	292	
<i>Ratnam v. Papa</i>	13 M. L. J. R., 292	followed.	426	
<i>Rhodes v. High</i>	2 B. and C. 345	referred to.	311	
<i>Sabapathi Chetty v. Narayanasami Chetty</i>	...	I. L. R., 25 M. 555	referred to.	497	
<i>Sardhar Lal v. Ambika Pershad</i>	I. L. R., 15 C. 521	referred to.	367	
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<i>Savarimuthu v. Aithirusu Routhar</i>	I. L. R., 25 M. 103 followed.	136
<i>Seshagiri v. Pichu</i>	I. L. R., 11 M. 452 dissented from.	83
<i>Seshagiri v. Pichu</i>	...	...	...	...	I. L. R., 11 M. 452 followed.	83
<i>Seth Chitor Mal v. Shib Lal</i>	I. L. R., 14 A. 273 dissented from.	83
<i>Shivaraao v. Pandlik</i>	I. L. R., 26 B. 437 dissented from.	83
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<i>Thakur Pershad v. Sheikh Fakir Ullah</i>	L. R., 22 I. A. 46 referred to.	214
<i>Toussaint v. Hartop</i>	7 Taunt 57 referred to.	311
<i>Veeraperumal Pillai v. Narrain Pillai</i>	...	...	...	...	1 Strange's N. C. 78 referred to.	318
<i>Velu Pillai v. Ghose Mahomed</i>	...	...	...	...	I. L. R., 27 M. 293 referred to.	210
<i>Venkata v. Chengodu</i>	...	...	...	...	I. L. R., 12 M. 168 not applicable.	225
<i>Venkatanarasimha Naidu v. Dandamadi Kotayya</i>	...	...	...	...	I. L. R., 20 M. 299 followed.	81
<i>Venkata Somayajulu v. Kannan Dhora</i>	...	...	...	...	I. L. R., 5 M. 184 followed.	131
<i>Venayak v. Gopal</i>	...	...	...	...	I. L. R., 27 B. 357 referred to.	341
<i>Vijendra Thirthaswami v. Sudhindra Thirthaswami</i>	...	...	...	...	I. L. R., 19 M. 197 overruled.	292
<i>Vitla Kamti v. Kalekara</i>	...	...	...	...	I. L. R., 11 M. 153 not followed.	445
<i>Zemindar of Tuni v. Bennayya</i>	...	...	...	...	I. L. R., 22 M. 156 followed.	360

Cause of action, meaning of.—See CIVIL PROCEDURE CODE (6).**Certified purchaser, suit against.**—See CIVIL PROCEDURE CODE (30).**Cess-tirupani—voluntary payment.**—See TIRUPANI CESS.**Charge for contribution.**—See MADRAS REVENUE RECOVERY ACT (1).

Charge of vendor when lost.—*See* TRANSFER OF PROPERTY ACT (3).

Charge statutory and charge equitable, difference between.—*See* TRANSFER OF PROPERTY ACT (3).

1. **Civil Procedure Code, S. 2.**—*Order rejecting appeal as out of time—Decree—Second appeal—Judgment pronounced by Court after 4 P. M.—Court closed for Christmas—Application for copy on the first day of re-opening—time requisite for obtaining copies—Computation of time.*

An order rejecting an appeal as being presented out of time is a decree, and a second appeal lies to the High Court from such decree.

Gulab Rai v. Mangli Lal, I. L. R., 7 A. 42. *Ragunatha Gopal v. Nilu Nathaji*. I. L. R., 9 B 452, *Ganga Das Dey v. Ramjoy Dey* I. L. R., 12 C. 30; *Ayyanna v. Nagabushanam*, I. L. R., 16 M. 285, and *Zemindar of Tuni v. Bennayya*, I. L. R., 22 M. 156 followed.

Where judgment was pronounced in a suit at 4 P. M. on the last day the Court sat before the Christmas holidays, and according to the practice of the Court no papers would be received after 4, and application was made for copy of the judgment on the day the Court re-opened for the first time after Christmas.

Held:—That an appeal presented within 90 days after deducting the Christmas holidays when no application could have been presented was in time, and that the appellant was entitled to a deduction of such time under the circumstances as being time requisite for obtaining copies of the judgment.

Saminatha Aiyar v. Venkatasubba Aiyar, 26 M. 518... 300

2. ————— **Ss. 2, 414-A, 562, 584 and 588, Cl. 28**—*Rent Recovery Act (VIII of 1865, Madras)*, S. 69—*Decision of Collector in summary proceedings under Act—Judgment—Decree—Civil Court—Remand order.*

A District Judge has jurisdiction under S. 562, C. P. C., to remand a summary suit under Act VIII of 1865 when there has been an appeal from the decision of the Sub-Collector in such suit and hence an appeal will lie under S. 588, cl. (28), C. P. C., from such order of remand.

Veerasawmi v. Manager, Pittapur Estate, 26 M. 518... 296

3. ————— **S. 13**—*Hindu Law—Adoption—Widow not joining—Stepmother—Heir entitled to possession suing as reversioner—Decree declaring plaintiff as reversioner—Res judicata—Mistake of law—Specific Relief Act S. 42.*

A suit by a plaintiff on the ground that the defendant being only a step-mother was not the heir and that the plaintiff or his ancestor was

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the heir entitled to possession is not barred under S. 43, C. P. C., by the fact that the plaintiff or his ancestor brought a suit against the defendant on the footing that she held a widow's estate and that he as next reversioner was entitled to set aside alienations made by the widow for no legal necessity.

A decree in such former suit declaring that the plaintiff's ancestor was next reversioner and was entitled to succeed to certain properties after the lifetime of the widow (i. e., the limited owner) operates as *res judicata* and debars the plaintiff from recovering in a subsequent suit the same properties during the lifetime of the widow on the ground that his ancestor was the heir entitled to possession in preference to the widow in the absence of fraud or collusion.

The principle of *res judicata* applies notwithstanding the fact that a declaration of the nature mentioned in the former decree ought not to have been passed in the former suit, notwithstanding that the former suit should have been dismissed under the proviso to S. 42 of the Specific Relief Act on the ground that the plaintiff as being real heir entitled to possession failed to ask for possession, and notwithstanding that the former suit and decree may have been the result of a mistake of law.

Kaveri Ammal v. Ramier, 26 M. 104 58

4. ————— S. 13, Expln. II.—*Res judicata*—Suit to set aside adoption by one reversioner—Decision how far binding on another—Limitation Act, Art 118—Meaning of “becomes known to Plaintiff”—Position of reversioner—Alternative case—Implied adjudication.

A decision in a suit brought by one reversioner to set aside an adoption by the widow or to declare an alienation made by the widow invalid is not *res judicata* as against another reversioner and does not bind such reversioner.

One reversioner does not claim through another.

The words “becomes known to plaintiff” in Art. 118 of the Schedule to the Limitation Act must be understood in their natural meaning and the word “plaintiff” cannot include a reversioner who stands in the same grade as another and who claim as heir of the last male owner in common with such other.

Bhagavanta v. Sukhi, I. L. R., 22 A, 33 followed; and Ayyadorai Pillai v. Solai Ammal, I. L. R., 24 M. 405 discussed.

Where a widow and the adopted son sued as co-plaintiffs and made their claim in the alternative, the defendants in such a suit were not bound to dispute the adoption and a decision in favour of the adopted son was not such an adjudication to raise an estoppel under S. 13, Explanation II.

Adilakshmi v. Venkataramayya 359

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5. ————— **S. 13, Explanation II and 43:**—*Usufructuary mortgage—No covenant to pay—First suit for recovery of money by sale dismissed—Second suit for possession—Different cause of action—Necessity of plaintiff to unite all causes of action—Res judicata—Misjoinder.*

Where a usufructuary mortgagee brought a suit for recovery of the mortgage money by sale of the mortgaged property impleading his own lessee as defendant and this suit was dismissed on the ground that no such suit would lie, a second suit by such usufructuary mortgagee for recovery of possession of the mortgaged property was barred neither by S. 43, C. P. C., nor by the rule and principle of *res-judicata* S. 13, Explanation II.

The causes of action in the two suits are distinct and different and neither S. 43 nor S. 13, Explanation II will apply in such a case.

A plaintiff is not bound to make every cause of action he may have at the date of the first suit in respect of the property then litigated a ground of attack.

Explanation II to S. 13 has not changed the law.

Kameswara Pershad v. Rajkumari Ruttun Koer, I. L. R., 20 C. 79, explained.

Arunachella Chetty v. Meyyappa Chetty, I. L. R., 21 M. 21, dissented from.

Ramasami Aiyar v. Vythinatha Aiyar, I. L. R., 26 M. 760, S. A. No. 777 of 1901 followed.

If a plaintiff in addition to a prayer for recovery of money by sale of the mortgaged property had also asked for possession, there would be a clear case of misjoinder or causes of action.

Veeranna Pillai v. Muthukumar Asari 439

6. ————— **Ss. 13, Explanation II, 42 and 43:**—*Act VIII of 1859, Ss. 2 and 7—Res judicata—"Cause of action" meaning of—"Matter directly and substantially in issue," meaning of—"Subject in dispute," meaning of—Suit upon specific mortgage—Dismissal—Suit upon another mortgage.*

A plaintiff who seeks to redeem a specific mortgage or to eject on a specific lease and fails on such suit on the ground that the mortgage or lease sued on is not proved is not thereby precluded either by reason of S. 43 or explanation II to S. 13 from seeking to redeem the property comprised in the former suit or a specific portion thereof from another specific mortgage or to eject the person in possession on the strength of his title, *Kameswar Pershad v. Rajkumari*, I. L.R., 20 C. 79, explained.

The expression "subject in dispute" in S. 42 of the Civil Procedure Code does not connote the *corpus* or *object-matter* of a claim but signifies the *jural relation* between the parties to a suit, for the determination of which the suit is brought, i. e., the cause of action or the subject matter of litigation or in other words the right which one party claims as against the other and demands the judgment of the court.

The object of the section is to require the plaintiff to bring forward his whole case as to the matter of litigation on the question of right involved in the suit and not to require him to unite all the causes of action which he may have against the defendant in respect of the *corpus* or object-matter of the suit.

The penalty for non-compliance with S. 42 is provided by S. 43 and Expl. II to S. 13.

The expression "matter directly and substantially in issue in" S. 13, will include not only the cause of action on which the suit is based but also all matters which are, or ought to be, put in issue for the determination of the cause of action.

Ss. 13 and 43, C. P. C., are not exhaustive of the law of *res-judicata* and this law has been the same under both the old and new Codes and is the same as the English Law.

The absence in S. 13 of the Code of 1882 (XIV of 1882) of the expression "cause of action" found in the old Code (Act VIII of 1859, S. 2) does not denote any deliberate change in the law and S. 13 does not require every plaintiff to exhaust in one suit all the causes of action which he may have at the date of the suit in respect of the property or the relief claimed by him and which he may then be aware of.

It is not the law that if a plaintiff sued for certain property on a false claim or cause of action, when in reality he has, in fact and law, a true claim and cause of action for the same property, of which he is aware, he must be taken in law to have abandoned or relinquished his true claim and cause of action. *Rangasami Pillai v. Krishna Pillai*, I. L. R., 22 M. 259, treated as overruled by the Full Bench decision in *Kaveri Ammal v. Sastri Ramier*, I. L. R., 26 M. 104,

Ramasami Aiyar v. Vythinatha Aiyar, 26 M. 760 448

7. ————— **S. 13, Explanation V:—**"*Bona fide litigating*"—Decree against *Karnavan*, binding nature of, on junior members—*Res-judicata*—Nonproduction of documents—Difference of opinion in weight attachable to documents.

Where a *Karnavan* suing or sued in a representative capacity litigates *bona fide* the decree passed in such suit in the absence of fraud or collusion will bind the junior members of the *tarwad* whom he represented.

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Where a decree has been passed against a person who sues or is sued in a representative capacity, the person or persons represented by him are bound by the decree in the absence of any fraud or collusion. Negligence in the conduct of the suit however gross, if it did not amount to fraud or collusion will not entitle him or them to avoid the decree.

The mere fact of non-production of certain karars or the mere fact that courts might now give weight to them though no weight was attached to them by the court which tried the former suit would be no proof of want of diligence and honesty, i. e., want of *bona fides* within Expl. V. to section 13, C. P. C., on the part of the Karnavan so as to entitle the junior members to rip open the former decree.

Madhavaya v. Kerala Varma Arsu 68

8. ————— **Ss. 13 and 536.**—*Decision in regular side as to rate of rent—No second appeal maintainable—Subsequent suit in small cause side—Court of competent jurisdiction—Res-judicata.*

A decision as to the rate of rent due to the landlord in a former suit would be *res judicata* and the operation of this principle would not be rendered nugatory by the fact that there was no second appeal under S. 536, C. P. C., from such decision.

Ahmed v. Moidin, I. L. R., 24 M. 444, followed.

A decision passed by the Munsif on the regular side may be *res judicata* in a subsequent suit filed before the same Munsif on the small cause side. The District Munsif on the regular side of his court is, within the meaning of S. 13, C. P. C., a court of jurisdiction competent to try the small cause suit, though by reason of the prohibition in the provincil Small Cause Courts Act, a regular court cannot try a small cause suit if there is a Small Cause Court capable of trying it.

Raja Simhadri Appa Row v. Ramachandrudu 23

9. ————— **S. 17.**—*Foreigner defendant—Jurisdiction of British Indian Courts—Carrying on business—Relation of Manager to Members of a Hindu family—Effect of foreign insolvency upon foreign judgment.*

Under S. 17 of the Civil Procedure Code, British Indian Courts have jurisdiction to try a suit as against a defendant who is a foreigner when the cause of action arises within the local limits of the jurisdiction of the British Indian Court.

Girdhar Damodhar v. Kassigar, I. L. R., 17 B. 662 approved.

Quære.—Whether the British Indian Court has jurisdiction as against a foreigner non-resident defendant who carries on business within the local limits through an agent, although the cause of action may have arisen in a foreign country, and not within the local limits of the British Indian Court.

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A managing member of a Hindu family is not an agent for the other members so as to make them liable to be sued as if they were the principals of the manager.

The relation between the manager and the other members of a Hindu family is not that of principal and agent or of partners. It is much like that of trustee and *cestui que trust*.

Question whether a suit upon a foreign judgment after the defendant is adjudicated a bankrupt in the foreign state is maintainable not decided.

Quelin v. Moisson, 1 Knapp, 265 referred to.

Annamalai Chetty v. Murugesu Chetty, 26 M. 544 287

10. ————— S. 28:—See MADRAS RENT RECOVERY ACT (7)

11. ————— S. 43:—Redemption suit—Suit upon one mortgage and title—Specific mortgage not proved—Mortgage of another date found—Redemption.

Where a plaintiff fails to prove the specific mortgage set up by him, no decree could be passed in his favour on the basis of any other mortgage, which the Court might find to have been proved in the suit.

Vasudevan Nambudri v. Krihna Pisharoti... .. 274

12. ————— S. 43:—See MADRAS REVENUE RECOVERY ACT (1).

13. ————— S. 43:—Suit based on specific lease, dismissed—Subsequent suit on title—Different causes of action—Former suit no bar—prayer for injunction to quit a house—prayer for possession—Tenancy found—Suit on title not maintainable—Ejectment suit on the ground of termination of tenancy proper remedy.

A prayer for an injunction to the defendant to quit a house is really one for possession.

A suit to eject the defendant based on a specific lease for a term of years which being unregistered is inoperative is no bar to the institution of a fresh suit passed on title. The causes of action in the two suits being different, S. 43. C. P. C., does not apply and is no bar to the second suit.

Where payment of rent is proved, a tenancy from month to month arises although a lease of the house becomes inoperative by non-registration.

Where there is a tenancy, a suit based upon title without stating how the tenancy has terminated is not maintainable.

Where the tenant has denied the landlord's title and the landlord claims that the tenancy has been forfeited by such denial, the landlord's remedy is by a suit for ejecting the tenant on the ground that the tenancy has determined and not by a suit on title as owner.

Nagasamy Aiyar v. Perumal Aiyar 475

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- 14. ————— Ss. 108 and 588:—***Decree against several defendants ex parte—Application by one to set aside ground not common to others—Order setting aside decree against all—Appeal from final decree.*

Where plaintiff obtains decree against several defendants *ex parte* and one of the defendants applies under S. 108, C. P. C., to set aside the decree passed against him *ex parte* on a ground not common to the other defendants, the decree cannot be set aside as against such defendants.

An order under S. 108, C. P. C., setting aside the decree in *toto* as against all the defendants is not appealable under S. 588 but may be questioned in an appeal against the final decree.

*Quære:—*Whether an order setting aside the decree on the application of one of the defendants under S. 108 will disturb the decree as regards the other defendants when the decree is passed on grounds common to all of them.

Mohamed Hamidulla v. Tohurunmissa Bibi, I. L. R., 25 C. 155 considered and explained.

Bhura Mal v. Harikishan Das, I. L. R., 24 A. 383 referred to.

Gopala Chetty v. Subbier, 26 M. 604 308

- 15. ————— Ss. 194, 195 and 647.—***Legal Practitioners' Act, S. 36—Application to declare as touts—Affidavits—Sessions or District Judge—Subordinate Courts—District and other Magistrates not subordinate—Criminal Procedure Code, S. 17 (1) and (5).*

It is competent to a District Judge to act upon affidavits in an application under the Legal Practitioners' Act to declare certain persons as touts. This procedure is warranted by Ss. 194, 195 and 647, C. P. C.

Under S. 36 of the Legal Practitioners Act, the District or Sessions Judge has jurisdiction to prohibit persons declared as touts to appear within the precincts of his own Court and of the Courts subordinate to him.

The District Magistrate and other Magistrates in the District are not subordinate to the Sessions Judge under S. 17 (1) and (5) of the Criminal Procedure Code.

Muhammad Bavu Sahib v. The District Judge of Madura, 26 M. 596 ... 372

- 16. ————— Ss. 208 and 259.—***Decree for moveable property—Alternative decree for, money—When alternative enforceable—No option to judgment-debtor.*

In a decree for moveable property the money amount is inserted under S. 208 as an alternative if delivery cannot be had.

The judgment-debtor is given no option in such case either to surrender the property or to pay the money.

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The alternative portion of the decree (for recovery of the money) only comes into operation when after putting in force S. 250, C. P. C., it is found impossible to obtain the property ordered to be delivered.

Manavikraman v. Moyankutti Musaliar 444

- 17.** ————— **Ss. 230 and 244, Cl. (c).—See TRANSFER OF PROPERTY ACT (5).**

- 18.** ————— **S. 243.—See LIMITATION ACT (14).**

- 19.** ————— **S. 244.—Decree-Holder Purchaser—Application for delivery rejected—Suit for possession—Maintainability.**

A suit by the decree-holder-purchaser for possession of land against the judgment-debtor after a previous application by him under S. 318, C. P. C., for delivery of property has been rejected as barred as having been made more than 3 years after the confirmation of sale is barred by S. 244, C. P. C.

Muttia v. Appasami, I. L. R., 13 M. 504; *Lakshmana Chettiar v. Kannammal*, I. L. R., 24 M. 185; *Kasinatha Aiyar v. Uthumansa Rowthan*, I. L. R., 25 M. 529; *Madhusudandas v. Govinda Priachoudhrani*, I. L. R., 27 C. 34 followed.

Murkanat v. Palakkhal Raman 237

- 20.** ————— **Ss. 244, 253, 336 and 349—Security given under S. 336—Applicability of provisions of S. 253 to realization of security under S. 336—Order directing security to be realized—Decree—Appeal.**

An order against a surety under S. 253, C. P. C., is appealable in the same manner as orders passed under S. 244, C. P. C., in execution of decrees.

S. 336, C. P. C., extends the provisions of S. 253, C. P. C., to the enforcement of the bond against the surety and an order against a surety under S. 336 is also, therefore, appealable. Where the judgment-debtor applies within one month to be declared an insolvent the surety under S. 336 is discharged. *Imbichunni Nayar v. Lalji Ram Dos Sait*, I. L. R., 24 M. 560, and *Krishnaier v. Krishnasamy Aiyar*, I. L. R., 26 M. 366 followed.

Raja Ram v. Bapu Chettiar 484

- 21.** ————— **S. 244.—See INDIAN INSOLVENCY ACT.**

- 22.** ————— **S. 252.—Hindu Law—Hindu dying—Debts no charge on inheritance—Representative not bound to pay rateably—Due application of assets—Debt due by deceased to representative—Representative's right to pay himself out—payments to the full value—Assets in possession of representative cannot be proceeded against—position of executor—jewels pledged by deceased—Redemption by representative with own funds**

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—*Lien—Unsecured creditors of a Hindu have no charge or lien on the inheritance.*

The heir and legal representative of the deceased coming into possession of the deceased's assets is not bound to pay each and every creditor *rateably*. S. 252, C. P. C., only provides that the representative can be proceeded against personally to the extent to which he has failed to apply the assets duly.

An heir paying debts but not paying the creditors *rateably* has not failed to apply assets duly within the meaning of S. 252, C. P. C. Every payment on account of a debt is a perfectly lawful payment irrespective of its effect upon other creditors and will be a due application of the assets within the meaning of S. 252.

There is no analogy between the position of an executor governed by the special provisions of the Indian Succession Act and that of the legal representative under the Hindu Law in respect of the distribution of assets.

Where payments have been made by the representative to the full value of the property that has come into his hands, creditors cannot proceed against such property on the mere ground that the representative is still in possession of property originally belonging to the deceased.

Ram Golam Dobey v. Ayma Begum, 12 W. R. C. R. 177, followed.

Where certain jewels were pledged by the deceased and the representative redeemed them with his own money, he is entitled as against the creditors to a lien with respect to the amount paid by him for redemption. The representative is not a mere volunteer in so redeeming with his own funds.

Where a debt is due by the deceased to the representative the latter is entitled to pay himself out of the assets as he cannot sue himself.

Veerasokkaraja v. Papiah, 26 M. 792 258

23 ————— **S. 264.**—*Sub-mortgage—Express assignment—Intention to keep alive—Right of mortgagor to redeem—Nature of decree.*

Where there is an express assignment of a prior charge (sub-mortgage) no question of keeping that charge alive arises.

Where a sub-mortgage is outstanding, the mortgagor is only entitled to a decree for redemption after paying off the amount due under the sub-mortgage and is not entitled to a decree for possession under S. 264, C. P. C.

Shouri Anna v. Anthoni Muthu 375

24. ————— **Ss. 268, 270, 295 and 490:**—*Attachment of a debt before judgment—Decree in plaintiff's favour—Judgment-debtor filing insolvency schedule—Title of Official Assignee to debt—Rights of attaching creditor—Effect of attachment—Act VIII of 1859, S. 270.*

S. 490, C. P. C., provides that where an attachment before judgment is made and a decree is passed in plaintiff's favour, it is not necessary to re-attach the property in execution of the decree.

An order of attachment does not operate so as to give to attaching creditor priority over the other creditors in the insolvency.

An order of attachment of a debt under S. 268 merely restrains the debtor's creditor from paying to the debtor and restrains the debtor from receiving the same.

Attachment prevents alienation, but does not confer title.

An attachment of a debt becomes complete so as to prevent the title of the trustee in bankruptcy or the Official Assignee only on receipt of the debt.

Even where an attachment of property is made and an order for sale is obtained by the creditor, the latter obtains no title to the property attached so as to prevent the same from vesting in the Official Assignee.

Sarkies v. Mussumat Bandho Bae, 1 N. W. P. 181, and *Frederick Peacock v. Madan Gopal*, I. L. R. 29 C. 428, followed.

Under S. 270 of Act VIII of 1859 an attaching creditor was entitled to priority as against subsequent creditors. The present Code of Civil Procedure (Act XIV of 1882), S. 295, has altered the law.

Where, therefore, the plaintiff obtained before judgment an attachment of a debt due to his debtor by Messrs. Parry and Co., and subsequently obtained a decree, and after such decree, the debtor filed his schedule and a vesting order was made in favour of the Official Assignee.

Held that the Official Assignee was entitled as against the attaching creditor to receive the debt due to the insolvent from Messrs. Parry and Co.

Krishnaswami Mudaliar v. The Official Assignee, 26 M. 673 278

25. ————— **S. 273**—*Limitation Act, Sch. II, Art. 179, Cl. (2)—Attachment of decree—Effect of—Decree-holder's right to apply for execution—Application in accordance with law.*

S. 273 of the Civil Procedure Code does not render the decree attached under it permanently incapable of execution or does not destroy the decree-holder's interest in the decree attached. It merely operates as a stay of execution unless and until the events mentioned therein take place and delay the realisation of the decree by the decree-holder.

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An application for execution of a decree made by the decree-holder when his decree has been attached and while the attachment is yet subsisting, is one in accordance with law and keeps the decree alive and a subsequent application made within 3 years of the such last mentioned application is not barred by Art. 179, Cl. (2), Limitation Act.

Patumma v. Idivi Beari 265

26. ————— Ss. 279, 280, 281, 283, 301 and 355.—

“Possession” and “Possessed”—Debt other than negotiable instrument—Attachment of—Claim by third party—Order on claim—Limitation Act, Sch. II, Art. 11.

The term “possession” is one which is used in widely different senses in dealing with different subjects and refers sometimes to tangible or physical possession and sometimes to constructive or legal possession.

The word “possessed” in S. 279 and the word “possession” in Ss. 208 and 281 are not restricted to merely tangible or physical possession but include constructive possession or possession in law of debts and other intangible property.

A debt may be attached under Ss. 266 and 268, and a claim may be preferred against the attachment and investigated under S. 278, and an order passed in such claim under S. 283, C. P. C., will be subject to the operation of S. 283, C. P. C. and Art. 11 of Sch. II of Act XV of 1877 (Limitation Act). *Basavayya v. Syed Abbas Saheb*, I. L. R., 24 M. 20, overruled.

The word “possess” in S. 355, C. P. C., is applicable not only to tangible property but also to debts and other intangible property.

Chidambara Patter v. Ramasami Patter 467

27. ————— S. 283—Order upon claim—Judgment-debtor

when a party—Necessity to sue in a year—Mortgage with power of sale—Deposit of title deeds by Mortgagee—Return of title deeds of Mortgagee—Exercise of power—Title of purchaser.

An order under S. 283, C. P. C., passed in a claim proceeding would bind the judgment-debtor if he was a party to such order.

Whether he was a party to such order will depend upon the circumstances under which the order was made and the terms of the order itself.

Guruva v. Subbarayudu, I. L. R. 13 M. 366 approved ; and *Sardhar Lal v. Ambika Parshad*, I. L. R., 15 C. 521 referred to.

Where the evidence as to service of the notice of claim is inconclusive, and, the order upon the claim does not show on its face that the judgment-debtor has been a party to the same, and the order is not.

necessarily inconsistent with the title being in the judgment-debtor (as where it states simply that the claimant is in possession) such order cannot be said to have been made against the judgment-debtor within the meaning of S. 283, C. P. C., so as to oblige the latter to bring a suit to set aside the order within a year.

Where the mortgagee parts with the title-deeds of the mortgaged property (as where he deposits them by way of equitable mortgage) and gets them back he can validly exercise the power of sale contained in the mortgage-deed so as to confer a valid title on the purchaser.

Muthusami Mudaly v. Ayyalu Bathadu 367

28. ————— Ss. 294, 295, 312, 314 and 622—

Purchase by Decree-holder—No permission of Court—Application to set aside—Confirmation—Person interested in sale—Limitation Act, Art. 166—Judgment-debtor's son—Void or Voidable—Restitution—Sale to a bona-fide purchaser.

The sons of a judgment-debtor are not persons interested in the sale of ancestral property held in execution of a money-decree against their father so as to be entitled to apply for setting aside the sale under S. 294.

Persons entitled under S. 295 to rateable distribution in the assets realized by the sale may be entitled to apply under S. 294 for setting aside the sale.

An application to set aside the sale under S. 294 must be made within 30 days from the date of the sale under Art. 166 of Sch. II of the Limitation Act.

No sale can be confirmed under Ss. 312 and 314, C. P. C., and become absolute until the expiration of such 30 days.

Where a sale, held in October 1887, was set aside under S. 294, C.P.C., upon an application made by the sons of the judgment-debtor in June 1888 long after the expiry of the 30 days prescribed by Art. 166 of the Limitation Act, and long after the sale was confirmed, the High Court might when the order setting aside the sale came to its notice in a case between the sons of the judgment-debtor and the purchaser for recovery of possession, set aside the said order under S. 622, C. P. C.

A purchase made by the decree-holder without the permission of the Court is not void, but only voidable under S. 294, C. P. C.

When a sale is set aside under S. 294, C. P. C., the judgment-debtor who has been benefited by the satisfaction of the decree in whole or in part must make restitution.

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The execution of the decree will be re-opened, the purchase-money if paid must be refunded to the purchaser and the decree-holder will be held responsible for any deficiency in the price which may happen on the re-sale and for the expenses incidental thereto.

When restitution is impracticable as where the decree-holder purchaser has sold property to a person who has purchased it *bona fide*, a sale cannot be set aside under S. 294 at the instance of the judgment-debtor or of any person interested in the sale.

Marimuthu Udayan v. Subbaraya Pillai 281

29. ————— **S. 310 A** :—See SEVERAL ATTACHMENTS.

30. ————— **S. 317**.—*Purchase for plaintiff—Certified purchaser admitting plaintiff's title—Defendants claiming under independent title—Suit against certified purchaser.*

Where there is no contest between the plaintiff and the certified purchaser and the defendants other than the certified purchaser claim under an independent title, S. 317 does not bar the suit of the plaintiff claiming the property on the ground that the purchase is benami for him. In such a case there is no "suit against the certified purchaser on the ground that the purchase was made on behalf of another person" within the meaning of S. 317, C. P. C.

Ramalinga Chetty v. Pachaiappa Mudaly 354

31. ————— **Ss. 367 and 523**.—*Arbitration, contract to refer to—Rule of Court—Death of one party, effect of—Revocation of contract only for just and sufficient cause—Leave of Court.—Abatement of arbitration.*

Under the English common law the authority of an arbitrator may, at any time before the award is made, be revoked at the pleasure of any party to the submission whether such submission be by agreement in writing, bond, deed or Judge's order or order at *nisi prius*. Such authority is, therefore, revoked in England by the death of any one of the parties to the submission.

Potts v. Ward, 15 B. R. 580; *Toussaint v. Hartop*, 7 Taunt 57; *Cooper v. Johnson*, 2 B. and Ald. 394, and *Rhodes v. High*, 2 B. and C. 345, referred to.

This rule of English common law has not been followed in India so that contracts to submit to the decision of an arbitrator are not revocable at the mere will or pleasure of the parties.

Narayanasami Naik v. Rangasami Naik, 8 M. H. C. R. 46, followed.

A submission which has not been made a rule of court is not revocable without just and sufficient cause, and a submission which has been made a rule of court can be revoked only with the leave of court for good cause shown.

Pestonjee v. Manockjee 12 M. L. A. 112 referred to.

Where an uncle and his nephew who were members of a joint family entered into an agreement in writing to submit their disputes relating to the partition of their joint property to the decision of some arbitrators, and the uncle applied under S. 523 to have the agreement filed and the application was registered and numbered as a suit but pending the proceedings before the arbitrators the uncle died and his daughter's son alleging himself to be the adopted son of the deceased, applied to continue the suit :—

Held (1) that the suit did not abate ;

(2) that the contract of submission not being personal to the deceased was not revoked by the death of one of the parties ; and

(3) that the procedure prescribed in S. 367, C. P. C., was the one that should have been adopted.

Venkata Satyanarayana v. Venkata Rangayya ... 311

32. ————— Ss. 408, 409 and 622.—*Leave to sue as pauper—Scope of enquiry—Pauperism of applicant—Enquiry into merits—Jurisdiction.*

The investigation contemplated under S. 409, C. P. C., where a day is fixed for hearing under S. 408 in an application for leave to sue *in forma pauperis* must be confined to the question of the applicant's pauperism. No evidence as to the merits of the case can be gone into in such an investigation. A Judge dismissing an application after allowing evidence to be taken upon the merits at such hearing has erroneously exercised a jurisdiction not vested in him by law and his order dismissing the application upon the merits can be set aside under S. 622, C. P. C.

K. Ranganayaka Ammal v. K. Venkata Chellapathy Nayudu, I. L. R., 4 M. 323, followed.

Vijendra Thirthaswami v. Sudhindra Thirthaswami, I. L. R., 19 M. 197, overruled.

Rathnam Pillai v. Pappa Pillai ... 292

33. ————— Ss. 408, 409 and 622 :—*Inquiry in petition for leave to sue in forma pauperis, scope of.*

The evidence referred to in S. 409, C. P. C., is confined to evidence in proof or disproof of the pauperism of the applicant and does not include evidence as to the merits of the case.

Ratnam v. Papa, 13 M. L. J. R., 292, followed.

Where a District Judge ordered further particulars of the fraud alleged in the petition and after the further particulars were given, the District Judge heard the parties under S. 409, C. P. C. and dismissed the petition even after the furnishing of particulars on the ground that the case was not more explicit than before.

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Held:—That the procedure adopted by the District Judge was irregular and materially affected the merits of the case, and his order may be set aside under S. 622, C. P. C.

Sankaramier v. Subramania Aiyar 425

34. ————— **S. 493**:—*See SPECIFIC RELIEF ACT (3).*

35. ————— **S. 496.**—*Suit for damages for a wrongful injunction—Title defective for want of registration—Right to recover damages dependent on title.*

Damages under S. 497 must be awarded by an order of Court in the suit in which the injunction is obtained wrongfully and even then only when it appears to the Court deciding the suit that there is no probable ground for instituting the suit.

A person whose title could not be recognised for want of registration and against whom an injunction had been obtained pending a suit for perpetual injunction which was ultimately dismissed as against him on the ground that the conduct of the plaintiff in that suit was fraudulent could not maintain a suit for damages for a wrongful injunction as he could not prove his title to recover damages, and S. 487 would not help him in such a case.

Seni Chettiar v. Santhanathan Chettiar 70

36. ————— **S. 502**:—*Conditions of applicability—Property or fund in another court in another suit—Person clearly entitled—Jurisdiction of court.*

Held, by the Full Bench (*Subramania Aiyar, J.*, dissenting), that an order under S. 502, Civil Procedure Code (for delivery of money) cannot be made.

(a). Where the party making the admission does not hold the property or other thing which the party applying for the order seeks to have delivered to him,

or (b). Where the property or other thing is held by another court ... to the credit of another suit.

Where, therefore, the Medur Ranees brought a suit against Papamma Row for recovery of the Medur estate and jewels and other moveable properties, and Papamma Row was appointed receiver and directed to deliver the jewels, cash, &c., to the Madras Bank at Cocanada to the credit of the suit, and there was a sum of ten lakhs of Rupees to the credit of this suit, and after the Medur Ranees' death the litigation was continued by the next heirs and was pending on appeal in the High Court, and litigation also ensued after Papamma Row's death among the next heirs after Papamma Row for Nidadavolu and Medur estates, who were also parties to the Medur litigation, and in such litigation it was admitted by all the parties that the defendants would be entitled to at least one-

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third, and one of the defendants applied under S. 502, Civil Procedure Code, for one-third of the cash in the Bank to the credit of the Medur suit.

Held—(Subrahmania Aiyar, J. dissenting) that S. 502 did not apply.
Per Subrahmania Aiyar, J :—

- (1). S. 502, Civil Procedure Code, is not confined in its operation to cases where the money or thing capable of delivery is actually held by a party to the suit.
- (2) The inherent power of a court could not be invoked except for the limited purpose of preserving and enforcing order, securing efficiency and preventing abuse of process in the exercise of a jurisdiction which the court otherwise possesses.
- (3). That the custody by a court of property belonging to litigants does not give the court any arbitrary power over it.
- (4). That though such custody cannot be interfered with by the orders of another court this is but a rule of comity intended solely to avoid unseemly collisions in the execution of process of different authorities.
- (5). That the rule in question is not a rigid and inflexible one, but is capable of adaptation to circumstances and can never be worked so as to defeat or obstruct the doing of justice in due course, and consequently in no way interferes with the power of a court other than that having custody to pass orders touching the property where it has jurisdiction to pass the orders and bind the parties in connection with whose litigation the custody of the other court began.
- (6). It is incumbent on the court having the custody on due application being made to it to give effect to such an order in so far as it is not inconsistent with the performance of its own duties respecting the property in the litigation before itself.

Per Arnold White, C. J., (Boddam, J. concurring).

- (1). Where property is the subject of legal proceedings the court has, no doubt, jurisdiction in certain circumstances to allow the payment of the income of the property to parties interested.
- (2). At any rate a High Court in this country has jurisdiction to make an order *pendente lite* for the payment of moneys in the hands of a receiver, to one of the parties to a suit.

Parthasarathy Appa Row v. Rungia Appa Row 501

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37. ————— **Ss. 520, 521 and 525.**—*Application to file award—Misconduct of arbitrator—Jurisdiction to set aside award—Refusal to file—One side not heard.*

Where a dispute is referred to arbitration without the intervention of Court, and after the award is made an application is made under S. 525 by one of the parties to file the award in Court, the judge, if he finds grounds mentioned in S. 520 or 521, C. P. C., can only refuse to file the award and has no jurisdiction to set it aside.

Muhammad Nawaskhan v. Alamkhan, L. R. 18, I. A. 73, followed; and *Chintamalayya v. Thadi Gangireddi*, I. L. R., 20, M. 89, distinguished.

If the arbitrators had heard only one side and declined to hear the other, that would be misconduct within the meaning of S. 521, C. P. C.

A judge cannot constitute himself a court of appeal from the decision of the arbitrators.

Sundara Mudali v. Ponnusami Mudali 275

38. ————— **S. 539** :—*See RELIGIOUS ENDOWMENTS (1).*

39. ————— **Ss. 549, 647 and 652.**—*Judgment of single Judge—Appeal under the Letters Patent—Security for costs.*

S. 549 of the C. P. C. applies only to appeals preferred to the High Court from the Subordinate Courts subject to its appellate jurisdiction.

Sabapathi Chetty v. Narayanasami Chetti, I.L.R. 25 M. 555, referred to. S. 549, C. P. C., is inapplicable to appeals under the Letters Patent from the decision of a single Judge of the High Court to two Judges; and S. 647 does not extend it to such appeals,

No rule for taking security for costs having been in force in the old Sudder Court in such cases, S. 9 of the Charter Act has no application.

No rule has been passed by the High Court under S. 652, C. P. C.,
Query—Whether it would be competent to the High Court to pass such a rule under S. 652, C. P. C.,

Sesha Aiyar v. Nagarathna Lala... .. 362

40. ————— **S. 584** :—*See SUIT OF SMALL CAUSE NATURE (2).*

41. ————— **S. 588** :—*Letters Patent, S. 15—Meaning of “final”—Judgment of a single Judge of High Court—Appealability.*

The word “final” in the concluding sentence of S. 588, Civil Procedure Code, is used not in the sense that a judgment or order falling under that section is not subject to review by the same court or to

revision by the High Court or to appeal to His Majesty in Council, but in the sense that there shall be no second appeal to a court of a higher grade.

A judgment passed by a single judge of a High Court in an appeal from an order mentioned in S. 588, Civil Procedure Code, is appealable under S. 15 of the Letters Patent.

Hurrish Chunder Chowdhry v. Kalisunderi Debi, I. L. R., 9 C. 482 and *Sabapathi Chetti v. Narayanasami Chetti*, I. L. R., 25 M. 555 referred to.

Muthuvaien v. Periasami Iyen 497

42. ————— **Ss. 595 (c) and 600** :—*See* TRANSFER OF PROPERTY ACT (3).

Claim for contribution by purchaser against other sharers :—*See* MADRAS REVENUE RECOVERY ACT (1).

Claim Proceedings, judgment-debtor how far a party :—*See* CIVIL PROCEDURE CODE (27).

Composition deed by judgment-debtor after insolvency :—*See* INSOLVENCY ACT.

Conditional or absolute payment :—*See* NEGOTIABLE INSTRUMENTS ACT.

Consideration immoral :—*See* CONTRACT ACT (1).

Consideration, part failure of :—*See* MORTGAGE (3).

Contract—*Building contract—Original time for performance—Penalty—Extra work given—Implied variation of time when extra work connected with original work.*

In the case of building contracts if the building owner has ordered extra work beyond that specified by the original contract which has necessarily increased the time requisite for finishing the work, he is thereby prevented from claiming the penalties for non-completion provided by the contract.

If the extra work is not one which the contractor is bound to undertake but which he nevertheless undertakes and if such extra work cannot be regarded as a separate and independent work but is one connected with the work originally stipulated for, the offer and the acceptance of such additional work will, by necessary implication, operate as a variation of the original contract as to the time therein fixed for the completion of the work. If the extra work is an independent work unconnected with the contract, then there can be no variation by implication of the original contract as to time.

The term fixed in a contract for its completion must, in the absence of a contract to the contrary, be taken to be with reference to the work specified in the contract and not with reference also to unspecified extra work which might be ordered under the contract.

Where a contract which consists in the doing of certain work is not indivisible but severable, each of the works therein referred to being itself an entire contract upon the completion of which the contractor would be entitled to receive payment therefor according to the rates mentioned in the contract, non-performance by one party of his promise with reference to one portion of the contract will not excuse the other of his liabilities under another portion of the contract.

Where security is given by a contractor to a company and the amount so deposited as security for the performance by the contractor of his obligations is neither treated by the contract as a penalty nor as liquidated damages but is to be applied "towards the satisfaction of any loss or damage which the company may sustain or incur" the company cannot forfeit the amount upon the breach of any of the contractor's obligations but is entitled to recoup itself for any damage arising from the breach of the contractor who will be entitled to recover the balance, if any, of the amount so deposited.

Narayanasawmy Reddiar v. The Madras Railway Company ... 488

1. Contract Act, Ss. 23 & 25, Cl. (2).—*Pro-note given during illegal cohabitation—Presumption of immoral consideration—Plea of immoral consideration—Plea of failure superfluous—Onus of proof—Shifting of proof—Failure of plaintiff to prove consideration immaterial.*

Where the defendant admitted execution of a promissory note in favor of the plaintiff, a woman, but pleaded that as it was for the purpose of future cohabitation the consideration was illegal, the onus of proof lay upon the defendant to prove such a case.

There is no presumption that a promissory note given during cohabitation is given only in consideration of future cohabitation and is therefore given for immoral consideration.

Where the judge, after hearing the defendant's evidence upon his plea, decides to hear also the plaintiff's evidence, he does not by the mere fact of hearing the plaintiff's evidence rule that the burden of proof is shifted to the defendant.

Where there was no plea of absence of consideration and the defendant failed to prove his case of illegal consideration, there must be a decree on the promissory note against him, notwithstanding that the plaintiff might not have proved her case, viz., that there was an advance of cash at the time of the promissory note.

Where the plea is that consideration is immoral, a plea that there was a failure of such consideration is immaterial and superfluous as the agreement itself will be void under S. 23, Contract Act.

Semble :—*Per Arnold White, C. J.*, a presumption that a promote is given for immoral consideration may arise where the note is given after a breaking of immoral relations, and is the outcome of a renewal of such relations.

Semble :—*Per Bhashyam Aiyangar, J.* A Promise made in consideration of past cohabitation is valid under the Indian Contract Act, S. 25, cl. 2.

Lakshminarayana Reddyar v. Subhadri Ammal 7

2. ———— **S. 25** :—*Natural love and affection—Registered instrument—Undertaking to discharge debt of another—Enforceable obligation—Failure to discharge—Payment by another—Right to recover from person undertaking.*

Where by a registered instrument a person on account of his natural love and affection for his brother undertook to discharge the debt due by his brother to a third person there is an enforceable obligation under S. 25 of the Contract Act.

Upon failure of the brother to discharge it, the person may pay the debt and recover the amount to be paid from his brother.

Venkatasamy Naidu v. Rangasamy Naidu 428

3. ———— **S. 69** :—*See HINDU LAW (4).*

4. ———— **S. 176** :—*Limitation Act, Arts. 57 and 120—Pledge of moveable—Right of pledge—Maintainability of suit for sale—Limitation—Personal remedy—Right of hypothecatee.*

Held (*Per Sir Subramania Aiyar, J. and Benson, J.*).—That a pledgee of moveable property may, notwithstanding he may have the right to sell the property under pledge under S. 176 of the Contract Act, sue to recover the amount due under the pledge by sale of the pledged property.

Art. 120 of the Limitation Act governs such a suit for sale, while Art. 57 will apply to a suit to recover the money personally from the debtor.

Villa Kamti v. Kalekara, I. L. R., 11 M. 153, not followed ; *Nim Chand Baboo v. Jagabhundhu Ghose*, I. L. R., 21 C. 21 and *Madan Mohan Lal v. Kanhai Lal*, I. L. R., 17 A. 284 followed.

Per Davies, J. Contra :—A suit at the instance of a pledgee to recover the debt by sale of the pledged property is not maintainable.

A suit for sale of the pledged property will be barred if a suit for recovery of the debt personally from the pledge be barred under Art. 57 as the right to sell is only accessory to the right to recover the debt. *Vitla Kamti v. Kalekara* followed.

An hypothecatee is entitled to sue for recovery of the debt by sale of the hypothecated property.

Mahalinga Nadar v. Ganapathi Subbien ... 445

Contract referred to arbitration, when revocable :—See CIVIL PROCEDURE CODE (31).

Contribution as between co-sharers of an estate :—See MADRAS REVENUE RECOVERY ACT (1).

Co-owner, refusal of, to sign patta :—See JOINT OWNERS.

Co-sharers, liability of, to contribution :—See MADRAS REVENUE RECOVERY ACT (1).

Costs—Discretion :—See PRACTICE.

Covenants positive and negative :—See SPECIFIC RELIEF ACT (3).

1. **Criminal Procedure Code, S. 17 (1) and (5)** :—See CIVIL PROCEDURE CODE (15).

2. **Criminal Procedure Code, S. 195**.—Magistrate granting sanction—Propriety or legality—Jurisdiction of Magistrate trying complaint to question.

The propriety or legality of a sanction granted under S. 195, Cr. P. C., by a competent Magistrate cannot be questioned by the Magistrate who tries the complaint instituted in pursuance of such sanction,

Pachai Ammal, In re—23 M. 189 ... 67

3. ————— **S. 423**.—Charges of theft, rioting, hurt, &c.—Acquittal on charge of theft—Conviction on other charges—Appeal by the accused—Setting aside of acquittal—Dacoity—Commitment to Sessions.

In the absence of dishonest intention a charge of theft cannot be sustained.

It is not competent to an Appellate Tribunal (at any rate one other than the High Court) to set aside an acquittal under S. 423, Cr. P. C.

Where, therefore, a 2nd Class Magistrate acquitted the accused on a charge of theft, but convicted them on charges of unlawful assembly, rioting and hurt, and on appeal by the accused against such conviction the Deputy Magistrate found that on the facts the accused must be held to have committed the offence of dacoity (by theft) and committed them to the Sessions :—

Held (1) that the Deputy Magistrate had no jurisdiction to set aside an acquittal in an appeal by the accused against their conviction upon other charges ;

(2) that without reversing the acquittal on the charge of theft, a necessary ingredient in the offence of dacoity would be wanting; and

(3) that the order of the Deputy Magistrate in committing the accused to the Sessions was wrong.

Sami Aiya v. King Emperor—26 M. 478 263

Custom, incidents attached by, effect of, on registration :— See REGISTRATION ACT (1).

Darkhast for lease :— See REGISTRATION ACT (2).

Darkhast, grant of, *Obtained by fraud upon Revenue authorities, binding character of*— See AGRICULTURAL TENANT.

Darkhast Rules (Madras) :— *Grant of house-site—Tahsildar's order granting lands for house-site—Appeal from darkhast grant to Sub-Collector—Sub-Collector requesting orders of Collector—Copy of Collector's order transmitted to Tahsildar—No decision by Sub-Collector—Collector's revisional powers—Matter not governed by Regulations—Madras Regulation II of 1803, S. 9.*

The grant of lands by Government for house-sites is not governed by any Regulation in force in 1803 or any Regulation subsequently enacted.

The Collector has no revisional powers under S. 9 of Regulation II of 1803 (Madras) over orders relating to grant of house-sites.

The subject of grant of lands by Government for house-sites is governed by executive orders of Government, which direct that the right of appeal from a Tahsildar's order with reference to the grant of a house-site shall be to the Sub-Divisional officer and not to the Collector, and that the order of the Sub-Divisional officer shall be final.

Where the Tahsildar ordered that a grant of lands should be made and there was an appeal from this order to the Sub-Collector, and the latter wrote to the Collector requesting favour of orders upon the matter, and the Collector passed an order revoking the grant which was communicated by the Sub-Collector to the Tahsildar :—

- Held** (1) that the Sub-Collector had exercised no discretion in the matter and made no order on the appeal;
- (2) that only the Sub-Collector could set aside the order of the Tahsildar in respect of the grant on an appeal preferred from the order of the Tahsildar;
- (3) that the matter not being dealt with by any Regulation, the Collector had no revisional powers, and his order could not, therefore, be regarded as an order made by the Collector in the legal exercise of his revisional powers;

and (4) the order of the Tahsildar not being legally set aside there was a valid grant.

Sappani Asari v. Collector of Coimbatore—26 M. 743 472

Declaration, suit for, effect of :— <i>See</i> LIMITATION ACT (11).	Page.
Decree against Karnavan— <i>Binding on junior members :—</i> <i>See</i> CIVIL PROCEDURE CODE (7).	
Decree for moveable property :— <i>See</i> CIVIL PROCEDURE CODE (16).	
Decree, judgment in summary suit is :— <i>See</i> CIVIL PROCEDURE CODE (1).	
Decree, order rejecting appeal out of time is :— <i>See</i> CIVIL PROCEDURE CODE (1).	
Decree for sale, nature of :— <i>See</i> TRANSFER OF PROPERTY ACT (5).	
Dedication of highway with reservation of rights :— <i>See</i> PENAL CODE (1).	
Dedication of idol and land :— <i>See</i> RELIGIOUS ENDOWMENTS (2).	
Direction by appellate Court to take accounts, how enforceable :— <i>See</i> TRANSFER OF PROPERTY ACT (5).	
Dishonest intention :— <i>See</i> PENAL CODE (3).	
District and other magistrates not subordinate to District Court :— <i>See</i> CIVIL PROCEDURE CODE (15).	
District Municipalities Act, Ss. 261 and 262 (Madras).— <i>Notice to Municipality—Amount of damages not specified—Municipality stating notice defective—Sender of notice requesting to be informed of defect—Objection under S. 262 not raised in first Court—Revision—Act IX of 1887, S. 25.</i>	
When a notice sent to a Municipality in compliance with S. 261 of the District Municipalities Act did not specify the amount claimed as compensation or damages and upon the Municipality stating to the sender of the notice that the same was defective the sender asked the Municipality to inform him of the nature of the defect, but the Municipality took no notice of his request, the suit should not be dismissed for the plaintiff not having complied with S. 261.	
<i>Eales v. Municipal Commissioners of Madras, I. L. R., 14 M. 386, referred to.</i>	
An objection by the Municipality that a suit against them is barred for not complying with the provisions of S. 262 of the District Municipalities Act, is one which cannot be raised for the first time in revision under S. 25 of Act IX of 1887.	
<i>Municipal Council, Kurnool v. Subbanna Chetty</i>	426
Drawee, liability of :— <i>See</i> NEGOTIABLE INSTRUMENTS ACT.	
Entire estates :— <i>See</i> MADRAS REVENUE RECOVERY ACT (3).	
Equity of Redemption, price of :— <i>See</i> SUIT BY PRIOR MORTGAGEE.	

1. **Estoppel** :—*See* MADRAS RENT RECOVERY ACT (4). Page.
 2. ——— *See* LANDLORD AND TENANT (6).

Evidence Act, S. 91 :—*See* REGISTRATION ACT (4).

Execution application by revival of prior attachment :—*See* SEVERAL ATTACHMENTS.

Execution sale.—*Auction-purchaser—Balance of purchase-money—Court closed for vacation—Fifteen days expiring during recess—Payment on re-opening day—Receipt of papers and granting of copies.*

Where the Court is closed for the vacation and provision is made only for the receipt of certain papers and the grant of copies of documents on certain days during the vacation, a purchaser at an auction-sale held prior to the vacation who has paid the 25 per cent. deposit will be justified in paying the balance of the purchase money on the first day after the vacation where the 15 days allowed to him expires during the recess.

Ari Chetty, In re... 271

Ex-parte decree—Application to set aside :—*See* CIVIL PROCEDURE CODE (14).

Foreign bankruptcy, effect of, on foreign judgment :—*See* CIVIL PROCEDURE CODE (2).

Grant by Government, effect of—*Estate in arrears of revenue—Claim for maintenance past and future—Grant in satisfaction of such claim—Right of resumption.*

In consequence of arrears of revenue due to Government by the Zemindar of Nidadavole who owed various other debts to other persons, and among them arrears of maintenance to a younger branch, an arrangement was come to by which a portion of the estate should be given to the Nuzvid Zemindar, who was the biggest creditor and the remaining should be handed over to the Zemindar "in the event of his satisfying the other creditors", the Government relinquishing their claim. In order to carry out such arrangement, the estate was purchased by the Government in revenue sale and a portion of estate was given to the Nuzvid Zemindar and an adjustment was made through the mediation of Government with the other creditors by which the Tangallamudi Mutta was assigned in satisfaction of the claims of the younger branch upon the Zemindar of Nidadavole for past and future maintenance. Some time after this adjustment, the Nuzvid Zemindar granted the estate of Chevendra in perpetuity to the same branch for a similar purpose, and a partition was effected among the different members of the younger branch with the privity of the Zemindars of Nuzvid and Nidadavole by which each of the two estates was allotted to the several members.

Grant by Government.—Continued.

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Held, by P. C. (1) that the grant of Tangallamudi was a grant by Government, and

(2) that the said grant was not resumable but created on heritable estate in the grantees.

Raja Rajajee Bahadur v. Raja Parthasarathi Appa Row—26 M. 202 ... 125

Guardian and Ward—*Testamentary guardian—Alienation by de facto guardian—Necessity—Acquiescence.*

An alienation of a minor's estate made by the *natural* and *de facto* guardian will be valid if for necessity notwithstanding that there was a testamentary guardian in existence (especially where such testamentary guardian had acquiesced in the alienation).

Arunachella Reddi v. Chidambara Reddi ... 223

Hereditary office—*See RELIGIOUS ENDOWMENTS (1).*

Highway, use of, for religious processions :—*See PENAL CODE (1).*

1. Hindu Law, Adoption :—*See CIVIL PROCEDURE CODE (3).*

2. ———— Adoption—*Authority to adopt given by husband—Construction—Authority not exhausted by one adoption—Successive adoptions.*

When a Hindu gives permission to his wife to adopt and shows a general intention to be represented by an adopted son and does not indicate any particular person for adoption either by name or otherwise, nor places any restriction upon the wife's discretion :—

Held that such authority is not exhausted by one adoption, but will extend to successive adoptions to be made by the widow when the necessity arises.

Veeraperumal Pillai v. Narrain Pillai, 1 Strange's N. C. 78, *Lakshmi Bai V. Ragoji*, I. L. R., 22 B. 996, and *Ramasami v. Venkatarama*, L. R. 6 I. A. 196, referred to.

Suryanarayana v. Venkatarama—26 M. 681 ... 318

3. ———— Adoption by widow—*Sapinda's consent—Authority of husband, false to the knowledge of sapinda, effect of—Sapinda's consent, effect of, some consenting—Sapinda's consent, some not being applied to, effect of—Consent of one of several undivided sapindas, sufficiency of.*

Where the assent of a sapinda is obtained under a representation by the widow that she had authority from her husband, and such authority turns out to be false, then the assent of the sapinda is inefficacious.

But if the sapinda knew the authority to be false, then his assent, if otherwise efficacious, may be valid.

In an undivided family the assent of the senior and managing member (or sapinda) may be sufficient.

In a divided family seniority has no bearing upon the validity of the assent.

The widow must apply for the assent of all the nearest sapindas and an adoption made with the consent of one, but without applying for the assent of another of the same grade, will be invalid though it may be that if application had been made he would have refused his assent.

Subrahmanyam v. Venkamma, 26 M. 627 239

————— *Contract Act, S. 69—Griha Pravesam and Rithusanti co-
penses—Person interested in making payment—Girl's mother.*

Griha Pravesam (entering the husband's house) and *Rithusanthi* (nuptials) are essentially connected with the disposal of a Brahmin girl in marriage and form part of the marriage ceremonies, and a person who takes by survivorship the share of the deceased in undivided property is bound to perform such ceremonies for the daughter of the deceased. The mother of the girl incurring such expenses is a person interested in making the payment and is entitled to recover them from the person in possession of the joint property under S. 69, Contract Act.

Vaikuntam Ammagar v. Kallapiran Aiyangar, 26 M. 497 25

————— *Gift or assignment by grandfather, binding nature of, as
against grandsons—Grandsons claiming in their own right and not as
heirs of the grandfather—Suit for cancellation not necessary.*

Where an assignment of certain property by the grandfather is invalid as against his grandsons, the latter are entitled in their own right as co-parceners to recover the property and are not bound to sue for cancellation of the invalid assignment in the first instance.

Kumarasami Goundan v. Nanjappa Goundan 21

6. ————— *Joint family consisting of father, son and son's sons—Mort-
gage by son not binding on family—Decree obtained by mortgage—Son's right,
title, and interest sold in specific lands—Father making gift of moiety in
lands sold to grandsons—Court sale—Partition—Ratification by father's
gift—Right of grandsons.*

Where a person purchases the right, title and interest of a member of a joint family in a specific portion of joint family property and the sale does not bind the other remaining members, the latter may affirm the sale in respect of the share of the member whose right, title and interest is sold in the specific land and will then become divided in respect of such portion of the family land. The purchaser in such a case need not be driven to enforce his purchase by bringing a suit for a general partition of the whole of the family property

Chinna Sanyasi v. Suriya, I. L. R., 5 M. 196 referred to.

Where a joint family consisted of the 2nd defendant's father, the 2nd defendant and the plaintiffs the 2nd defendant's sons and in execution of a decree obtained on a mortgage-bond executed by the 2nd defendant and not binding on the family, the 1st defendant became the purchaser of the right, title and interest of the 2nd defendant in a specific portion of the joint family property and the interest of the sons in such property also passed by the sale and the 2nd defendant's father thereupon made a gift of the moiety of the specific property to his grandsons (the 2nd defendant's sons) who now brought a suit to recover such specific moiety :—

- Held* :—(1). that the gift by the 2nd defendant's father amounted in effect to a ratification of the court sale as effecting a partition of the property (to which the sale related) between himself and his son ;
- (2). that as the gift is by a member of a joint family of property with respect to which he is divided the same is valid and the fact that he is undivided with respect to other property does not affect its validity ;
- (3). that no decree for joint possession with the purchaser could be passed ;
- and (4). that if the lands sued for under the gift represented a fair half of the lands to which the 1st defendant's sale related, a decree for recovery of the same should be given ; otherwise the Court should allot to the plaintiffs such portion of the lands as would represent their half-share.

Kadegan v. Peria Munusami 477

7. ———— *Joint family, relation of managers to other members* :—See CIVIL PROCEDURE CODE (9).

8. ———— *Marriage of members—Member holding office and in possession of family funds—Presumption of family property—Onus on member to shew self-acquisition—Life Insurance Policy—Premium paid out of savings—Policy, character of—Asset available for division.*

The cost of the marriages of the members of a Hindu family is a legitimate charge on family funds. Where family jewels to the value of Rs. 800 have been expended on such occasions, these are not assets available for partition.

Where a member of a Hindu family is holding an office under Government (which fetches him a separate income) and is in possession of family funds and has been managing or helping to manage the family property, it lies upon him to show that what he claims to be his separate property has not been acquired by family funds,

A Life Insurance Policy held by a member is not an asset available for division during his lifetime and must be treated as the separate property of the member where he pays the premium out of the savings of his salary.

Mahadewa Pandia v. Rama Narayana Pandia 75

9. ————— *Maternal uncle's property—Sister's sons members of a joint family—Nature of estate taken by sister's sons—Rule of survivorship—Tenants in common—Mother's stridhanam—Sons taking as tenants in common.*

Sons take the property of the mother as tenants in common and not as co-parceners with rights of survivorship.

The definitions of obstructed and unobstructed heritage given by the *Mitakshara* refer in terms only to the heritage of the property of a male.

The estate of a maternal uncle devolves upon his nephews who, at the time of the uncle's death, are members of an undivided family, not as joint tenants, but as tenants in common or as co-owners without benefit of survivorship.

The *Jagampet case*, I. L. R., 25 M. 678, considered and explained.

In Hindu Law "Ancestor" does not mean 'propositus,' but a direct ascendant in the paternal or the maternal line.

Daughter's sons living together as coparceners take the estate of their maternal grandfather as coparceners with rights of survivorship and on the property vesting in them their issue acquire a right by birth in such property.

Karuppai Nachiar v. Sankaranarayanan Chetti 308

10. ————— *Oral gift by father to his daughter—Title invalid—Possession of donee adverse—Prescription for full estate—Right of reversioner to question.*

When under an oral gift made in 1884 (which was invalid under the Transfer of Property Act) by the last male owner to his daughter the latter remained in possession for over 12 years :—

Held :—(1) that she prescribed for a full estate ;

(2) that the possession of the donee was adverse to the donor and his representatives whether the title was valid or otherwise ; and

(3) that a reversioner claiming through the donor's son cannot question such possession after the expiry of 12 years.

Venkatrayudu v. Subbamma 302

11. ————— *Reversioners' suit—Resjudicata—See CIVIL PROCEDURE CODE (4).*
12. ————— *Stridhan.—Benares School—Succession—Stridhan inherited by a woman—Nature of estate—Devolution—Preference of daughter's son to daughter's daughter.*

Property inherited by a woman from a male is not her absolute property and passes on her death not to her *Stridhan* heirs but to the heirs of the person from whom she inherited it.

According to the Bengal School it is well settled that property inherited by a woman from a woman does not on the death of the former pass as her *Stridhan*.

What has once descended as *Stridhan* does not so descend again.

According to the Mayukha what has passed by inheritance from a woman to a woman goes on the death of the latter to a special line of heirs with a preference for females, who would succeed to it if it were her *Stridhan* proper.

According to the Benares Law also *Stridhanam* property inherited from a woman by a woman ceases to be *Stridhanam* and is not the absolute property of the latter.

The text of the *Mitakshara*, Ch. II, S. 11, pl. 2 (last portion) not followed.

Where *Stridhanam* of a mother devolved upon her daughter the daughter's daughter is not entitled under the Benares Law in preference to the daughter's son upon the death of the daughter.

Sheo Shankar Lal v. Debi Sahai 330

13. ————— *Stridhan.—Property inherited by a woman from a woman—Qualified estate—Oudh Estates Act, Ss. 2, 10 and 11.*

A person who has a limited estate in property subject to the Oudh Estates Act, 1869, has not by virtue of any provisions in the Act any absolute power to alienate the whole estate.

The Legislature must have used clear language if it intended to depart from the ordinary principles of law by empowering people to alienate what may not belong to them.

Courts may go behind the Act to the extent of recognizing trusts and giving effect to beneficial titles distinct from the statutory title under the Act.

Hindu Law.—*Continued.*

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A daughter who has succeeded to her mother's Stridhan does not possess an absolute estate and a mortgage executed by her is not valid beyond her life-time.

A passage in the judgment of Privy Council in *Jagdish Bahadur v. Sheo Partab Singh*, L. R. 28 I. A. 100 at p. 106 explained.

Sheo Pertab Bahadur Sing v. The Allahabad Bank, Limited ... 33C

14. ———— *Suit to set aside or establish an adoption:—See LIMITATION ACT (8).*

15. ———— *See CIVIL PROCEDURE CODE (22).*

16. ———— *See PROBATE ACT*

Hindu Will in town of Madras:—*See SUCCESSION ACT.*

House trespass:—*See PENAL CODE (2).*

Incidents attached by custom, effect of, on registration:—
See REGISTRATION ACT (1).

Illegal agreement:—*See MADRAS ABKARI ACT I OF 1886.*

Illegal cohabitation—Pro-note given, during:—*See CONTRACT ACT (1).*

Insolvency Act, 1843, S. 7.—*Civil Procedure Code, S. 244— Insolvency petition—Vesting order—Composition with creditors—Dismissal of petition—Re-vesting—Attachment—Trustee's right to claim—Maintainability of suit.*

S. 7 of the Insolvency Act, 1843, provides that if, after the making of any vesting order, the insolvent's petition should be dismissed, the vesting order becomes null and void from and after such dismissal, provided, however, that all acts done by the Official Assignee in the interim will be good and valid and has the effect of re-vesting the property in the insolvent retrospectively from the date of the vesting order.

Where a vesting order is made and then the insolvent enters into a composition with his creditors and his insolvency petition is afterwards dismissed, such composition-deed is valid and upon the dismissal of the petition the property reverts in the insolvent.

A trustee under a composition-deed executed by the judgment-debtor before attachment of his property is entitled to bring a suit to set aside the attachment and such a suit is not barred by S. 244, C. P. C.

Kothandarama Routh v. Murugesu Mudali ... 372

Injunction, temporary :—See SPECIFIC RELIEF ACT (3).

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———— **perpetual** :—See SPECIFIC RELIEF ACT (8).

Jaghirdar, not registered, is a landholder under Rent Recovery Act :—See MADRAS RENT RECOVERY ACT (1).

Joint owners—*Refusal of some to sign pattu—Rent due by tenant irrecoverable—Right of others to sue for damages.*

Where in consequence of the refusal of some of the co-owners of a land to sign a pattu for acceptance by the tenant, rent due by the tenant became irrecoverable, the co-owners who so refused to sign would be liable to the others for the loss sustained by them as regards their share of the rent.

The fact that a remedy for partition was open to the other owners would not take away the right of the latter to sue for damages.

Mathureswara Bhattar v. Karpura Kutti Bhatiar 222

Jurisdiction of British Indian Courts over foreigner defendant :—See CIVIL PROCEDURE CODE (9).

———— **(Small Cause)** :—*Judge being invested with Small Cause jurisdiction subsequent to the filing.*

Where a suit is filed on the regular side and the presiding judge is subsequently invested with small cause jurisdiction an order transferring the suit from the regular to the small cause side is erroneous and must be set aside.

Sankarachariar v. Murugesu Mudaliar 438

———— **to set aside award** :—See CIVIL PROCEDURE CODE (37).

Jus tertii plea of :—See SPECIFIC RELIEF ACT (2).

1. Kanom, agreement to renew :—See SPECIFIC PERFORMANCE.

2. ——— *Meaning of "Avasyamai Chodikumbole" or "Avasyamayi Vendumbole"—Redemption by Jenmi within 12 years—Necessity to show special exigency.*

A suit for redeeming a kanom within 12 years from the date of the kanom is maintainable even where the kanom contains provisions that the Jenmi should recover only "Avasyamai Chodikumbole" or "Avasyamayi Vendumbole" and the jenmi need not show any special exigency before he is allowed to redeem.

The words "Avasyamayi Chodikumbole" or "Avasyamayi Vendumbole" mean only "on demand." *Mahomed v. Ali Kaya*, J. L. R., 14 M. 76 overruled.

Kelu Nedungadi v. Krishnan Nair, 26 M. 727 374

Kanom.—Continued.

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3. ————*Time-expired—Usufructuary mortgage by Kanomdar—Redemption by Jenmi—Knowledge of risk—Mortgagee's right to claim interest or loss of profits.*

Where a time-expired but unredempted kanom is usufructually mortgaged to a person who knows it is time-expired and there is no provision in this second mortgage for interest, the mortgagee of the kanom interest will, on redemption of the kanom and recovery by the jenmi of the properties demised on kanom, not be entitled to claim either interest or loss of profits.

Moidu Haji v. Kunhi Moidu 314

Landlord and Tenant—*Enfeiture of tenancy by denial of landlord's title :—See CIVIL PROCEDURE CODE (13).*

2. ————*inoperative specific lease, effect of :—See CIVIL PROCEDURE CODE (13).*

3. ————*proof of tenancy by payment of rent :—See CIVIL PROCEDURE CODE (13).*

4. ————*Remission of Rent or revenue—Discretion of Collector—Obligation only moral not legal.*

An obligation to grant remission of revenue can only be moral but not legal.

A provision for remission of rent according to the discretion of the landlord can only be a moral obligation not enforceable in Civil Courts.

Alagappa Chettiar v. Tirunagavalli 377

5. ————*Right of Jaghirdar to tender patta :—See MADRAS RENT RECOVERY ACT (1).*

6. ————*Tender of two pattas within the fasli—Practice for a long time—Acquiescence—Objection when to be taken.*

A patta may be reduced to writing in two separate papers and a tender by the landlord of both the papers within the fasli is unobjectionable.

Where it has been the practice to tender such second patta for a long time and the tenant has been accepting it during that time, whichever party objects must give timely notice to the other of his objection.

Gorinda Shetti v. Sriniva Rao Sahib 371

7. ————*Termination of Lease :—See MORTGAGE (5).*

8. ————— *Zemindar—Lands given for private service—Discontinuance of service—Resumption of some lands—Notice for the remaining lands sufficient.*

Where lands are given by a Zemindar to certain Nayaks as remuneration for certain private services to be rendered to him by them, it is competent to the Zemindar to give notice that the services are dispensed with and resume the lands.

Where after the services were discontinued, the Zemindar took possession of some of the lands and the Nayaks acquiesced in the same, it is sufficient if the Zemindar gives notice to the Nayaks of the remaining lands.

Venkata Narasimha Appa Rao v. Sobhanadri Appa Rao 209

Leave to sue in forma pauperis, scope of enquiry in:—*See* CIVIL PROCEDURE CODE (38).

Legacy to child:—*See* INDIAN SUCCESSION ACT.

1. **Legal Practitioners' Act, XVIII of 1879, S. 13.**—“Other reasonable cause.”—*Departmental inquiry—Anonymous letter by pleader—Intention to influence mode of enquiry—Professional misconduct.*

A legal practitioner addressing an anonymous letter to a Sub-Collector holding a departmental inquiry into a charge of bribery against a Revenue Inspector and intending by such letter to influence the mind of the officer holding the enquiry in connection with the matter he is investigating is guilty of misconduct and may be properly suspended “for other reasonable cause” under S. 13, cl. (f), Legal Practitioners' Act.

In the matter of Purna Chunder Pal Mukhtear, I. L. R., 27 C. 1023 followed.

Sub-Collector of North Arcot v. V. C. Seshachariar 65

2. ————— **S. 36**:—*See* CIVIL PROCEDURE CODE (15).

3. ————— **Rules 31 and 35.**—*Suit for declaration of title to immoveable property—Pleader's fee.*

Rule 31 of the Rules framed under the Legal Practitioners' Act, is not confined to cases in which Court fees are payable *ad valorem*.

A suit for a declaration of right in respect of immoveable property is not a suit in which “the subject-matter of the claim does not admit of valuation” within the meaning of Rule 35, but falls within Rule 31, and the pleader's fee must be fixed with reference to the latter rule.

Achutta Bhatta v. Manjunathayya, 26 M. 654 358

Letters Patent, §. 15 :—See CIVIL PROCEDURE CODE (41).

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Lien :—See TRANSFER OF PROPERTY ACT (3).

—— **of unsecured creditors of a Hindu** :—See CIVIL PROCEDURE CODE (23).

—— **of vendor when lost** :—See TRANSFER OF PROPERTY ACT (3).

—— **statutory and lien equitable, difference between** :—See TRANSFER OF PROPERTY ACT (3).

1. Limitation :—See MADRAS REVENUE RECOVERY ACT (1).

2. ——— Computation of Time—Gazetted holiday—Dies non—Suit filed on next day.

A suit filed under the Rent Recovery Act is not barred by the rule of 30 days if the last day happens to be a general public holiday and the suit is filed on the succeeding day.

Such a holiday should be regarded as a *dies non* for purposes of limitation.

Ghulam Ghouse v. Venkatachalam Pillai 316

3. ——— exclusion of time requisite for obtaining copies :—See CIVIL PROCEDURE CODE (1).

4. ——— for suit for setting aside revenue sale :—See MADRAS REVENUE RECOVERY ACT (5).

5. ——— Suit for wrongful levy of Karnam fees :—See MADRAS REVENUE RECOVERY ACT (4).

6. ———, time for reversioner to question adverse possession :—See HINDU LAW (10).

1 Limitation Act, Arts. 14 and 16.—*Ryotwari land—Ryots applying for land being classified as Poramboke—Exemption from assessment and classification—Extinguishment of title—Right of original ryots to retain possession—Levy of penal assessment—Suit for recovery—Coercion.*

Where at the request of the ryots certain land occupied by them was exempted from assessment and classified as *gramanattam*, the ownership or title of the ryots is extinguished and it is not open to them notwithstanding such classification to retain the land.

Where land is classified as *poramboke nattam* and is annexed to the village site, the land is at the disposal of Government, and the latter may grant it to *bona fide* applicants for house-sites.

Where penal assessment was levied by the Government against persons in occupation of village *poramboke*, without the consent of Government, a suit for the recovery of the sums so paid will be barred after one year from the date when the assessment is levied either under Art. 14 or Art. 16 of the Limitation Act.

Such payments in order that they may be legally recoverable by suit must have been made under coercion.

Mahammad Meera Mohideen v. The Secretary of State for India ... 269

Limitation Act.—Continued.

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2. ————— **S. 20, Arts. 61, 99, 120 and 132** :—See
MADRAS REVENUE RECOVERY ACT (1).
3. ————— **S. 28** :—See RELIGIOUS ENDOWMENTS (1).
4. ————— **Arts. 57 and 120** :—See CONTRACT ACT (4).
5. ————— **Arts. 110 and 116** :—See MADRAS RENT RECOVERY ACT (5).
6. ————— **110 and 120** :—See MADRAS REVENUE RECOVERY
ACT (2).
7. ————— **118**—Meaning of “becomes known to Plaintiff” :—
See CIVIL PROCEDURE CODE (4).
8. ————— **Arts. 118, 119 and 141**.—*Specific Relief Act*,
S. 42—*Hindu Law*—*Suit to set aside or establish an adoption*—*Suit for bare
declaration*—*Suit for recovery of possession*.

Held, by the Full Bench (*Bhashyam Aiyangar*, J. dissenting) that
where a plaintiff cannot obtain a decree without getting a decision
that an adoption is invalid or never in fact took place, or that an
adoption is valid his claim will be governed by Articles 118 and 119,
Sch. II, of Act XV of 77 though he may also seek for the recovery
of possession of immoveable property.

Art. 141 of the same Act does not apply to a case where the plaintiff
cannot succeed without impugning or establishing an adoption.

Per *Prashyam Aiyangar*, J. :—Articles 118 and 119 apply only to
declaratory suits sanctioned by S. 42 of the Specific Relief Act.

Ratnamasari v. Akilundammal, 26 M. 291 27

9. ————— **Arts. 119 and 142**—*Gift by adop-
tive mother*—*Invalid against adopted son*—*Possession taken by donee under
gift*—*Interference of adopted son's rights*—*Suit for possession more than 6
years after*—*Limitation*.

A deed of gift by the adoptive mother in favour of her daughter, in
pursuance of an alleged testamentary direction by the donor's hus-
band is in the absence of such direction invalid as against the
adopted son and possession taken by the daughter under such gift
is a direct interference with the rights of the adopted son.

A suit brought by the adopted son more than 6 years after such
possession by the daughter will be barred under Art. 119, Sch. II,
Limitation Act, 1877, and is not governed by Art. 142.

Ponnammal v. Ratnam Asari 144

10. ————— **Art. 119**—*Interference of adopted
son's rights*—*Interference with regard to other properties*—*Starting point for
limitation*.

The interference by the defendant which is the starting point for
limitation under Art. 119 need not relate directly to property sought
to be recovered in the suit.

Limitation Act.—Continued.

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Where therefore the defendant interfered with plaintiff's right as adopted son with respect to certain property and more than six years after such interference the plaintiff sought to recover by virtue of his adoption certain property from the defendant :—

Held, that the suit was barred by Art. 119.

Akilandammal v. Ratnam Asari 145

11. ——— **Arts. 120 and 131.**—*Right to receive Tasdik—Declaration, suit for—Limitation—Adjudication, effect of.*

A suit for a declaration that the plaintiff as Dharmakarta of a certain religious institution is entitled to receive direct from Government a certain Tasdik amount payable annually is governed by Art. 120 and not by Art. 131.

Where the right to sue for such declaration accrued to the plaintiff more than six years before suit, he will be only entitled to a declaratory decree for that portion of the amount which appertains to the six years prior to suit.

The adjudication of plaintiff's right will, however, be sufficient for the Government to act upon even in regard to the other years.

Srinivasa Ramamujachariar v. Subbachariar 267

12. ——— **Arts. 124, 127 and 142:**—*See RELIGIOUS ENDOWMENTS (1).*

13. ——— **Art. 166:**—*See CIVIL PROCEDURE CODE (28).*

14. ——— **Arts. 178 and 179, Test of applicability of Article:**—*Mortgage-decree—Application for execution—Limitation—Civil Procedure Code, S. 243—Stay of execution—Suit disposed of—Application after such disposal of—Application for order absolute—Application to keep decree alive.*

Whether Art. 179 or Art. 178 will apply to a particular application will depend upon the nature and portion of the decree sought to be executed and upon the fact of the application in question being the first or a subsequent application.

The true criterion in determining whether Art. 179 or 178, applies to a particular application is to ascertain whether any one of the six points of time specified in Col. 3 of Art. 179 is applicable to it and if none of them applies it is only then that Art. 178 will apply. Under the present Law (See para. 4 of Art. 179) an application cannot be made merely for the purpose of signifying the decree-holder's intention to keep the decree in force as it would be possible under the old Law (See para. 4 of Art. 167 of Act IX of 1871).

An order staying execution under S. 243, C. P. C., merely possesses execution but does not vary the decree.

An order varying the decree can only be made either on review under S. 623, C. P. C., or an amendment under S. 206, C. P. C., or under S. 210, C. P. C.

An order staying execution may be passed either by the Court which passed the decree or by the Court executing the decree as a proceeding in execution under S. 244, C. P. C.

Where an order is passed under S. 242, C. P. C., staying execution of a decree pending the disposal of a suit, no day is fixed for payment of the amount due under the decree within the meaning of para. 6, Art. 179 (3rd Col.).

A decree which directs a sale of the mortgaged property in default of payment of the mortgage money within a time fixed by the decree is not a decree directing the payment of the amount to be made at a certain date within the meaning of para. 6, Col. 3 of Art. 172, Schedule II of the Limitation Act (XV of 1877).

Where no prior application for execution of such decree or to take some step in aid of execution is made and an order is obtained under S. 243, C. P. C., staying execution of such decree pending the disposal of another suit than an application for execution made after the disposal of such suit is governed by Art. 178 of Schedule II of the Limitation Act although 3 years may have elapsed from the date of the decree or the date mentioned in the decree for payment provided the application is within 3 years from the disposal of the suit when the right to apply for execution accrues and provided 3 years from the date mentioned in the decree for payment have not elapsed at the date of the order staying execution.

A first application for execution of a decree directing the sale of mortgaged property made on default of payment by the mortgagor within the time fixed is governed by Art. 178 and not Art. 179.

Where there is a personal decree against the mortgagor and the application is to execute the decree as such, limitation will run from the date of the decree under para. 1, if payment is enforceable under the decree from the date thereof or from a future date if payment can be enforced under the decree only on or after such future date fixed in the decree.

An application for an order absolute for sale under S. 89 of the Transfer of Property Act is only an application to enforce the decree.

In construing the Articles of Schedule I of the Limitation Act stress must not be laid exclusively upon the entry in the first column ignoring the entries in the 3rd column.

If the various starting points fixed in the 3rd column of any article from which the period of limitation is to be reckoned do not cover all cases falling within the class of suits or applications described, then the article in question is not exhaustive of the class. If the article is inapplicable to certain cases comprised in the class those cases will be governed, in the case of suits by the residuary Article No. 120 and in the case of applications by the residuary Article No. 178.

Rungiah Goundan & Co. v. Nanjappa Row, 26 M. 780 ... 412

15. ——— **Art. 179, Cl. (3).** :—See CIVIL PROCEDURE CODE (24).

Madras Abkari Act I of 1886, Ss. 22 and 24, Cl. (c).—*License to sell arrack—Subletting by license-holder—Duty of license-holder and sub-lessee to obtain Collector's permission—No sanction—Illegal agreement.*

Where there is a duty both on the part of an holder of a license to sell arrack (cl. 21 of the license issued under S. 24, cl. (e) of Madras Act I of 1886) and on the part of his assignee or sub-lessee (S. 22, Madras Act I of 1886) to obtain the Collector's permission to the sub-letting, an agreement by the license-holder that his sub-lessee should sell arrack and pay profits to the license-holder without the Collector's sanction is illegal and cannot be enforced.

Pakuru Dasu v. Bheemudu, 26 M. 430 133

- 1. Madras Rent Recovery Act (VIII of 1865), S. I, Cl. (1) and (2) and Ss. 3 and 80**—*Madras Regulation XXVI of 1802—Holder of a Jaghir not registered—Tender of patta—Meaning of "Land-holder" and "Jaghirdar"—Proceedings construction, &c.*

The holder of a Jaghir is entitled to tender a patta under Madras Act VIII of 1865, or to proceed under the said Act for the recovery of rent before he is registered as a Jaghirdar under Madras Regulation XXVI of 1802.

The term "landholder" appearing in cl. (1) of the Rent Recovery Act not confined to registered landholders.

The words "and all other registered holders of land in proprietary right" in cl. (2) cannot be taken to qualify the class of persons enumerated in clause (1).

Quere :—Whether those words have the effect of qualifying the preceding words in cl. (2).

The term "Jaghirdars" in Ss. 1 and 3 of the Act are not confined to registered Jaghirdars.

The word "Proceedings" in S. 80 of Madras Act VIII of 1865 does not include tender of patta is limited to summary proceedings for arrears of rent taken after tender of patta.

The Darmakarta of Baktavatsala v. Luchimi Dass, 26 M. 589 335

- 1a. ——— meaning of rent** :—*See MADRAS REVENUE RECOVERY ACT (2).*

- 2. ——— Ss. 3 and 7** :—*See JOINT OWNERS.*

- 3. ——— S. 4** :—*See PROVINCIAL SMALL CAUSE COURTS ACT (3).*

- 4. ——— Ss. 4, 8, 9 and 82** :—*Patta accepted for a long series of years—Estoppel—Alienation—Provision to pay tirva jasti if tenant should cultivate wet crops on dry land—Fees payable to village servants—Immemorial usage—Power of landlord to recover by summary process—Interest—Provision that tenant should remove produce after paying rent—Propriety of patta—Uncertainty of terms in patta—Contract not opposed to law—Test of uncertainty.*

Where a patta, containing certain terms which are now objected to by the tenant for the first time, has been tendered by the landlord and accepted by the tenant for a series of years without objection, the tenant is estopped from subsequently disputing the propriety of the patta in a suit for rent although he may not have accepted it for the year in question.

The conduct of the tenant in accepting patta in the previous years amounts to an implied representation that the patta so tendered and accepted is proper.

Such representation is not as to a matter of belief or opinion.

The estoppel continues against the tenant until the latter withdraws his representation by communicating to the landlord that he objects to the terms in question in time to permit the latter to tender a proper patta or to sue to settle the terms thereof under S. 9 of the Rent Recovery Act.

A provision in the patta that if the tenant raise nunjah crop on punjah land with sircar water he should pay rent payable on neighbouring nunjah land is not indefinite and is, therefore, not bad for uncertainty.

It is proper to define in a patta the terms of the tenancy with reference to a possible contingency which may arise in the course of the fasli for which the patta is tendered.

There is material distinction between the power of a court in dealing with questions raised in a suit under S. 8 or S. 9 of the Rent Recovery Act not settled by contract nor specifically provided for by law and its power in dealing with a litigation arising out of a contract constituted by an accepted patta.

In the former the court has to decide with reference to its view of what is fair and proper under all the circumstances while in the latter the court has only to decide whether the terms are obnoxious.

The test in determining whether the terms in a patta are certain is to see not whether the terms are in themselves certain, but whether they are capable of being made certain.

The maxim of the law to be applied in such cases is *Id certum est quod redd certum potest*.

According to the immemorial custom of the country, the fees due to the village servant and other public servants of the village are payable out of the produce of the land and in a majority of cases it is the landlord that has to collect and pay them over to the servants concerned.

A provision in the patta therefore that the payment of the customary fees or merais payable by the tenant along with rent in connection with the services of the village accountant will also be enforced by proceedings under the Act and is not improper and a stipulation that interest will be charged on arrears on such fees is also enforceable.

Although such fees may not be rent in the sense in which the landlord can appropriate them for himself, still so far as their recovery is concerned, they must be treated as part of rent under S. 4 of the Rent Recovery Act.

A provision in the patta that the tenant should remove the produce after paying the rent is not an illegal one and is binding upon the tenant if he contracts to that effect though it will not be upheld in a suit under S. 9.

The provision in S. 92 of the Rent Recovery Act empowering the Collector to take security from the tenant for the rent shows that a contract of such a nature is not opposed to law.

Per Boddam, J. :—The facts alleged are not incapable of supporting a case of estoppel by conduct, but estoppel cannot arise unless it is proved that the landlord's position has been altered in consequence of such conduct.

Sankarachariar v. Varada Pillai 429

5. ———— **Ss. 7 and 9** :—*Limitation Act, Arts. 110 and 116—Adjudication by Civil Court that permanent patta should be tendered and muchilika executed—Res judicata—Tender of permanent patta—Refusal by tenant—Suit for rent maintainable—No necessity of tender for each fasli—Limitation.*

Under S. 9 of the Rent Recovery Act a landlord can maintain a suit for the recovery of rent though there has been no exchange of patta and muchilika provided he has tendered such a patta as the tenant is bound to accept.

Where there is an adjudication in a Civil Court that the landlord should tender a permanent patta and the tenant should execute a corresponding muchilika after such tender it is *res-judicata* as between the parties thereto.

Where there is a tender of such a permanent patta by the landlord, no fresh tender of patta by the landlord is necessary for each fasli, and the landlord can maintain a suit for rent against the tenant upon the strength of such tender.

A tender of a patta not accepted by the tenant is not a contract between the parties though a suit for rent is maintainable under S. 7 of the Rent Recovery Act.

A suit for rent brought by the landlord after tender of a registered patta but refused by the tenant is not governed by the 6 years' rule of limitation provided by Art. 116 of the Limitation Act but by the rule of 3 years under Art. 110.

Ramakrishna Chettiar v. Appa Row 485

6. ———— **Ss. 7, 9, 10 and 72** :—*Landlord and Tenant—Suit for enforcement of patta—Judgment modifying patta—Necessity of fresh tender—Suit for rent—Maintainability.*

Where the pattah originally tendered was such as the tenant was bound to accept and judgment was passed in the Summary Court directing the execution of a muchilika a suit for rent would be maintainable without the necessity of a fresh tender after the judgment.

Where the pattah is amended by the judgment in the summary suit, the landlord may maintain a suit for rent if before the expiry of the fasli to which the pattah relates the landlord has tendered a pattah as amended.

Where no such tender is made or no such tender can be made by reason of the expiry of the fasli before the judgment amending the pattah is passed a suit for rent is only maintainable either when the tenant has executed a muchilika in accordance with the judgment modifying the pattah in the summary suit or if the tenant has refused to execute such a muchilika when a certified copy of the judgment is declared by S. 72 of the Rent Recovery Act to have the same force and effect as a muchilika executed by the tenant himself.

There is no refusal to execute a muchilika by the tenant within the meaning of S. 72 of the Rent Recovery Act unless before the suit for rent is brought by the landlord the latter makes a requisition or demand on the tenant calling upon him to execute a muchilika in accordance with the judgment then in force.

Court of Wards v. Dharmalinga, I. L. R., 8 M. 2, overruled.

Shunmuga Mudaly v. Palnati Kuppu Chetty, I. L. R., 25 M. 613, followed.

Bashyakarlu Naidu v. Subbanna

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7. —————, **Ss. 36 and 40**.—*Civil Procedure Code*, S. 28

—*Misjoinder*—Landlord taking special procedure under Act for realization of rent—Onus on landlord to show requirements of Act have been complied with—Arrears of rent—Attachment by landlord of defaulter's interest in land—Sale, notice of—Interval of time between date of issue of notice and sale—Irregularity—Sale vitiated—Sale after 7 days from date of public notice immaterial—Parties in a suit to set aside sale.

It is for the landlord who seeks to avail himself of the special procedure by way of distress provided for by the Act to show that the requirements of the Act have been complied with.

Maharajah of Burdwan v. Tarasundari Debi, I. L. R., 9 C. 609., *Nathu Achalaiayyangar v. Parthasarathi Pillai*, I. L. R., 3 M. 114, *Mahomed Zamir v. Abdul Hakim*, I. L. R., 12 C. 67 and *Hurro Doyal Roy Chowdhry v. Mahomed Gasi Chowdhry*, I. L. R., 19 C. 699, followed.

Ss. 36 and 40 of the Rent Recovery Act should not be read together so as to import into S. 40 the effect of S. 36 as regards sales of moveable property.

Prima facie, a non-compliance with the requirements of the Act will vitiate a sale. An exception is introduced to this general rule by S. 36 which is expressly limited to the case of moveable property.

The reason for the exception is that damage sustained by irregularity in the sale of moveable property can in all cases be met by pecuniary compensation.

An irregularity in the sale under S. 40 of the defaulter's interest in the land will vitiate the sale. *Nathu Achalaiayyangar v. Parthasaradhi Pillai*, I. L. R., 3 M. 114, followed.

S. 18 does not require that notice should be published 7 days before date of sale, but that in fixing the date of sale not less than 7 days must be allowed from the time of public notice.

Where a sale is notified to take place for a number of days, the first day is none the less "a day fixed for sale" within the meaning of S. 18, although as events may turn out no sale may in fact take place on that day.

Though a sale of every item of the property sold is a separate sale and different persons may have purchased at such sales a suit by the tenant to set aside the sales against the different purchasers is a suit in respect of the "same matter" and is not bad for misjoinder where the ground of relief is the alleged wrongful sale of the tenant's lands in respect of the same arrears and the proceeding in respect of which the various items are sold is one.

In a suit under S. 283, C. P. C., the cause of action is not the order under S. 283 but the alleged wrongful attachment is the cause of action and the different purchasers of the attached property may be properly joined as defendants in the same suit.

Dorasamy Pillai v. Muthusamy Moopan ... 471

8. ——— S. 69 :—See CIVIL PROCEDURE CODE (2).

1. **Madras Revenue Recovery Act (II of 1864), Ss. 2 and 42.**

Transfer of Property Act, Ss. 82 and 100—Civil Procedure Code, S. 43—Limitation Act, S. 20, Arts. 61, 99, 120 and 132—Co-sharers of an estate—Decree against one for partition and mesne profits—Alienation by judgment-debtor co-sharer—Revenue in arrear subsequent to sale—Attachment by Collector of vendor's share—Realization of revenue—Purchaser's claim for contribution against other sharers—Charge against estate of other sharers—Suit to enforce charge—Period of limitation—Suit to enforce personal liability—Limitation.

Where subsequent to a decree for partition of an estate in the possession of the managing member who was accountable to the other members for mesne profits the managing member sold his interest to a third person and the revenue due upon the whole estate not being paid the Collector attached the managing member's share and realized the arrears due upon the whole estate from such share.

Held by the Full Bench that the purchaser had a charge upon the estate of each of the other co-sharers for their share of the revenue.

Seshagiri v. Pichu, I. L. R., 11 M. 452 followed; *Kinuram Doss v. Mosafar Hussain*, I. L. R., 14 C. 309; *Seth Chithor Mal v. Shib Lal*, I. L. R., 14. A 273; and *Shivarao v. Pandlik*, I. L. R., 26 B. 437, dissented from.

Madras Revenue Recovery Act—Continued.

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Per *Subramaniam Aiyar, J.*—

“Justice, equity and good conscience” ought to be resorted to and are universally accepted as words compendiously denoting those ultimate principles of what is right and proper, fair and reasonable and good and expedient which principles are resorted to by Judges in dealing with difficult questions not directly governed by existing precedents which often arise in the course of the administration of justice.

Per *Benson, J.*—

The words “charge created by operation of law” are more extensive than “charge created by law” and includes a charge created directly by the provisions of an Act as well as a charge created indirectly as a legal consequence of certain conditions.

The charge to the purchaser was directly created by Sections 2 and 42 of Act II of 1864 and was a charge by operation of law within the meaning of S. 100, Transfer of Property Act.

Per *Bhashyam Aiyangar and Moore, JJ.*

The purchasers claim is not barred by S. 43, C. P. C., by reason of his omission to join the present defendant as a party in a former suit brought by him against other co-sharers.

Gangi v. Ramasami, 12 M. L. J. R., 103, approved.

The purchaser's right to claim contribution arises notwithstanding he may not have paid any money in discharge of the revenue and the Collector may have realized the same out of the share belonging to the purchaser.

The right to claim contribution exists, whether the party seeking contribution makes the payment voluntarily or involuntarily, i. e., whether he makes the payment and thus averts coercive process against his property or without making such payment suffers his property to be seized under process of law for the purpose of the amount being realised from its income or by its sale.

Rodgers v. Maw, 15 M. & W. 444, approved.

“Money paid” in Article 61 or 99 of Act XV of 1877 includes “money voluntarily or involuntarily paid”.

The receipt by mortgage of the produce of land mortgaged to him is a payment within the meaning of S. 20 of Act XV of 1877.

Article 120 does not apply to a suit for contribution in a case where the amount was realized by sequestration or sale of the property of person seeking contribution.

Where moneys have been received in excess of plaintiff's share of revenue from time to time under Art. 99, a suit for contribution will be barred as regards such portion of the excess as have been recovered more than 3 years before suit.

Art. 99 applies to cases of suits brought for contribution by a co-sharer of an estate registered in the joint names of several. If the estate is registered in the name of one and the others are interested, Art. 61 will apply.

Madras Revenue Recovery Act—Continued.

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Per *Bhashyam Aiyangar, J.*

A co-sharer's claim for contribution where he pays or is forced to pay arrears of revenue due upon the entire estate is a charge upon the estate of the other co-sharers.

Whether a person paying rent due upon a land which is not a charge upon such land and which he is liable to pay along with others is entitled to a similar charge—*Quære*.

Whether a subsequent mortgage paying off arrears of revenue acquires a first charge for such payment in preference to the prior mortgages—*Quære*.

The right of contribution secured by S. 82 of the Transfer of Property Act is a 'real right' and not simply a "claim in personam."

Baldeo v. Baij Nath, I. L. R., 13 A. 371, referred to.

(*Dubitante*); The words "several properties of several owners" mean not only separate plots respectively owned by separate owners but also distinct shares severally owned by two or more owners as cotenants in common with unity of possession.

The lien or charge in favor of the person claiming contribution in respect of payment of revenue does not depend upon the doctrine of subrogation.

The lien under S. 2 of the Rev. Recovery Act is a lien by operation of law in favour of the crown only.

When revenue is assigned to a subject, it ceases to be public revenue and is converted into rent or private property.

A suit for the enforcement of a charge is governed by the 12 years' period provided by Art. 132 of the Limitation Act.

Per *Moore, J.*

The claim for contribution by the purchaser is not a charge upon the shares of the other co-sharers.

Seshagiri v. Pichu, I. L. R., 11 M. 452, dissented from.

Justice, equity and good conscience are captivating terms and ought not to be resorted to unless consistent with sound general principles and the intention of the legislature.

Maharaja of Vizianagaram v. Somasekhararaz, 26 M. 686 ... 83

2. Madras Revenue Recovery Act (II of 1864), Ss. 2 and 42.—Government paying Mohini to trustees—Direction by Government to ryot to pay first crop assessment—No assignment of public revenue—Title to sue in the name of trustees—Personal claim—No rent—Limitation Act, Arts. 110 and 120—Rent Recovery Act.

An arrangement by which the Government directs its ryot to pay to certain trustees of a mutt first crop assessment on the land instead of itself paying cash to the said trustees is not an assignment by Government of the public revenue to the trustees.

Krishnasami v. Venkatarama, I. L. R., 13 M. 319, referred to.

The trustees on default by the ryot in paying the assessment should bring the matter to the notice of the revenue authorities, and it would be competent to the latter to realize the arrear under Act II of 1864 (Madras) and pay it over to the trustees, but the latter will not be entitled to sue in their own name for the amount.

Ss. 2 and 42 of the Revenue Recovery Act are applicable only to public revenue and not to realization of sums due to an institution like the plaintiff's mutt.

If the trustees are entitled under the arrangement to sue, in their own names their claim is only a personal one against the holders of the land for the time being.

Where the trustees are not constituted Inamdars but are entitled under the arrangement to sue in their own names for the first crop assessment, their claim is not one for rent within the meaning of the Rent Recovery Act or Art. 110 of the Limitation Act. Such a claim falls under Art. 120 of the Limitation Act.

Where the trustees obtained a decree personally for their claim against the representatives of the original ryot, who agreed with Government to pay over first crop assessment to the trustees, the latter are not entitled also to a decree personally against the transferees who were possessed of the land.

Kasturi v. Anantharam Thicari, 26 M. 730 248

3. ————— S. 5.—Madras Regulation XXV of 1802,
S. 3—Two pattas—Arrear due in respect of revenue of one—other patta land sold—Property of defaulter—Liability and rights of purchaser with respect to land purchased—No transfer of registry, effect of—"Entire estate".

Per Moore, J. :—Where a sale is made of certain ryotwari lands in a Government village by the owner and then registered holder, or there is a sale of the latter's interest and the purchaser does not apply for transfer of registry, the lands comprised in the patta are still liable for Government revenue due by the original defaulter with respect to that land.

Mangamma v. Timmapaiya, 3 M. H. C. R., 134 (136) followed.

The provision in S. 5 of Madras Act II of 1864 that all the moveable and immoveable property of the defaulter is liable for revenue due upon any land of the defaulter does not enable the Government to proceed against property originally belonging to defaulter, but afterwards (and prior to sale by Government for arrears of revenue) sold to a third person in whose name the patta has not been changed when there is no arrear of revenue due in respect of the land sold, such property not being the asset of the defaulter.

Madras Revenue Recovery Act.—Continued.

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Per *Davies, J.* :—The land which is liable to be sold for arrears of revenue must either be the land on which the revenue is due or the land which is the property of the defaulter.

Where there is no arrear of revenue due upon a land and the land is sold prior to the sale by Government, such land ceases to be the property of the defaulter.

The words "entire estates" in S. 3, Regulation XXVI of 1802, do not mean all the estates of a single individual, but the several estates of different persons. A patta represents a whole or entire estate possessed by an individual. Land held under another patta is a separate estate.

Narayana Raja v. Ramachandra Raja, 26 M. 521 ... 139

4. ————— **S. 59**—*Karnam fees—Suit for wrongful levy of such fees—Limitation.*

A suit against the Government for the recovery of money alleged to have been wrongfully or illegally levied under Madras Act II of 1864 from the plaintiff by the Government for fees said to be due to a Village Karnam must be brought within six months of the date when the cause of action arose under S. 59, Madras Act II of 1864.

Suryaprakasa Row v. The Secretary of State for India ... 380

5. ————— **S. 59**—*Revenue sale— not confirmed—Owner when aggrieved—Suit for setting aside sale—Limitation.*

The title of a purchaser in a revenue sale becomes complete only on confirmation by the Collector and the purchaser becomes entitled to possession and to have the lands registered in his name only after such confirmation. The owner whose property is sold for arrears of revenue cannot be said to be a person "aggrieved" within the meaning of S. 59 of Act II of 1864 until such confirmation by the Collector and may therefore bring a suit for setting aside the sale within six months from such date. Decision in *Venkata v. Chengodu*, I. L. R., 12 M. 168 is no longer applicable.

Sabapathy Chetti v. Rangappa Naicken, 26 M. 405 ... 225

1. **Madras Regulation II of 1803**:—See DARKHAST RULES.

————— **X of 1831**:—See TRANSFER OF PROPERTY ACT (4).

————— **XXV of 1802, S. 3**:—See MADRAS REVENUE RECOVERY ACT (3).

2. ————— :—See MADRAS RENT RECOVERY ACT (1).

1. **Malabar Law**.—*Karnavan, decree against, binding on junior members*:—See CIVIL PROCEDURE CODE (7).

Malicious prosecution, action for :—*Prosecution for offence—Application for security for good behaviour.* Page.

To sustain an action for malicious prosecution there must have been a prosecution by the defendants of the plaintiff for an offence.

Where an application is made by the defendants to a Magistrate that security should be taken from the defendants under Ss. 107 and 110 of the Criminal Procedure Code, there is no prosecution of the plaintiff by the defendants for an offence, and no action for malicious prosecution will lie.

Kandasami Asari v. Subramania Pillai 370

Management by turns, of hereditary office :—*See RELIGIOUS ENDOWMENTS (1).*

1. Mesne profits, suit for :—*See PROVINCIAL SMALL CAUSE COURT ACT (1).*

Misconduct of arbitrator :—*See CIVIL PROCEDURE CODE (37).*

Misjoinder of parties :—*See MADRAS RENT RECOVERY ACT (7).*

Mohini allowance, nature of :—*See MADRAS REVENUE RECOVERY ACT. (2).*

1. Mortgage.—*Covenant to pay in instalments—Provision that mortgagee is entitled to possession if after the last instalment falls due anything remains due under the mortgage—Mortgagee entitled to bring a suit for sale on the personal covenant.*

Where under a mortgage document the amount is payable in certain instalments and the mortgagor personally covenants to pay as each instalment falls due, the mortgagee is clearly entitled to sue for each instalment and recover the same by sale of the mortgaged property and personally from the mortgagor, and this right is not curtailed by the fact that there is a further provision in the mortgage-deed that the mortgage is entitled to take possession of the mortgaged property if at the end of the date fixed for the last instalment the debt remained wholly unsatisfied.

Ramayya v. Venkatarama Gurraju 2

2. ——— Mortgage and mortgagee—Sub-mortgage by mortgagee—Suit for sale by mortgagee—Sub-mortgagee no party—Sale proceeds realized—Right of sub-mortgagee to a lien over proceeds—Transfer of Property Act, S. 138.

Where a mortgagee brings a suit for sale and money is realised and brought into court, a sub-mortgagee has no lien over the fund in Court.

Where certain money decree-holders of the mortgagee attach the money in Court and draw the same, a sub-mortgagee cannot compel them to refund any portion of the said money.

S. 138 of the Transfer of Property Act refers only to the transfer of a debt and has no application to a sub-mortgage by the mortgagee.

Singaravelu Udayan v. Ramaiyer 306

3. ———— *Property subject to mortgages—Assignment by mortgagor—Undertaking by assignee to redeem prior mortgages—Part failure of consideration—Assignee entitled to sue for redemption.*

Where the consideration for an assignment by a mortgagor of property which is the subject of certain prior incumbrances is partly the undertaking by the assignee to redeem the prior mortgages and partly the payment of cash, the assignment is good and the assignee is entitled to sue for redemption of the prior mortgages notwithstanding that there may be a failure of consideration as to the cash payment.

Mangab Thuppan v. Kadir Kutti

4. ———— *Prior and Puisne mortgagees.—Suit by prior mortgagee—Puisne mortgagee no party—Purchaser under prior mortgage-decree—Suit by puisne mortgagee to redeem prior mortgage—Right of equity of redemption to redeem.*

A puisne mortgagee is not bound by a decree obtained by a prior mortgagee in a suit to which the puisne mortgagee was no party.

A sale held in pursuance of such decree will pass to the purchaser only the equity of redemption. Where a puisne mortgagee obtains a decree on his mortgage without joining the prior mortgagee and the purchase in the execution of the prior mortgage decree and purchases the property he does not acquire any rights on the footing of the purchase. He is however entitled to bring a suit for redemption of the prior mortgage.

Such redemption, however, will not affect the right of the purchaser at the sale in execution of the prior mortgage decree or his assignee from redeeming in his turn as owner of the equity of redemption such puisne mortgagee on payment of the amount due to him under the mortgage.

Where the puisne mortgagee held two mortgages, one of which covered the plaint property subject to the prior mortgage, but the other comprised besides this property some other items not the subject-matter of the suit :—

Held, that the question of the right of the assignee of the equity of redemption to redeem the puisne mortgagee could not be gone into in the suit brought by the latter for redemption of the prior mortgage.

Sivaraman Chetty v. Kuppumuthu 72

5. ———— *Purchase of plantain plantation—Lease of land to purchaser by vendor—Mortgage of plantation by purchaser—Termination of lease—Rights of mortgagee to plantain trees.*

Where a person absolutely purchased a plantain plantation and got a lease of the land on which the plantation was standing, a mortgage

of the plantation from such purchaser would be entitled to the security of the plantain trees notwithstanding that the lease of land to his mortgagor might have been determined.

Rangasami Konan v. Sellapperumal Padayachi ... 3

6. ——— documents, proof of :—See TRANSFER OF PROPERTY ACT (6).
7. ——— keeping alive a prior charge :—See CIVIL PROCEDURE CODE (23).
8. ——— redemption by one of several uralans :—See TRANSFER OF PROPERTY ACT (8).
9. ——— redemption of :—See KANOM (2).
10. ——— suit, without impleading, puisne mortgage, effect of :—See SUIT BY PRIOR MORTGAGE.
1. **Mortgagee's right** to claim interest or loss of profits against his mortgagee whose Kanom is time expired :—See KANOM (3).
2. ——— with power of sale, effect of power upon return of title deeds to mortgagee :—See CIVIL PROCEDURE CODE (27).

Non-joinder of co-uralans as plaintiffs :—See TRANSFER OF PROPERTY ACT (8).

Notice of dishonor :—See NEGOTIABLE INSTRUMENTS ACT.

—— to quit in a month to an agricultural tenant, sufficiency of :—See AGRICULTURAL TENANT.

Negotiable Instruments Act, S. 94.—Debt—Creditor accepting bill or note—Conditional or absolute payment—Presumption—Discount in addition to interest for trouble in realization—Negotiation—Additional security—Notice of dishonor—Drawee primarily liable—Lapse of a reasonable time—Notice not necessary—Pleading—Necessity of averment—Discharge.

Whether there is a debt and the debtor gives a note, bill, or hundi for the debt, it is a question of fact in each case whether the parties intend the same as absolute or conditional of payment. The *prima facie* presumption as to the effect of giving and taking a note or bill is that the debt is conditionally paid and not satisfied.

Where the creditor is allowed a discount of 2½ per cent. on the amount of the hundis in addition to interest which is more than a reasonable compensation for the trouble to be taken by the creditor in realizing the hundies, payment is absolute and not conditional. The mere negotiation of the note or bill and the taking of an additional security are consistent with either case.

Where the bills were given as an absolute payment, the creditor cannot sue on the original debt or cause of action.

Notice of dishonor must be given even to a drawer though he may be primarily liable where the drawee does not accept.

S. 94 of the Negotiable Instruments Act recognises that the person to whom notice of dishonor is given should be informed not only that the instrument was dishonored and in what way, but also "that he will be held liable thereon."

Notice of dishonor must be given within a reasonable time after dishonor.

A person who says that notice of dishonor is not necessary is averring an exception to the general rule, and must, if he wants to rely upon the same, allege the special circumstances which constitute the exception in the pleadings.

Where either due notice of dishonor is not given or is given after the lapse of a reasonable time, the person liable in case of dishonor will be discharged.

Jambu Chetty v. Palaniappa Chettiar, 26 M. 526 ... 252

"On emergency," meaning of :—See KANON (2).

Onus of proof :—See CONTRACT ACT (1).

— of proving self acquisition :—See HINDU LAW (8).

— rights of permanent occupancy :—See ZEMINDAR AND RYOT.

Order in execution of decree under S. 9 of Act I of 1877 not appealable :—See SPECIFIC RELIEF ACT (1).

— setting aside *ex parte* decree :—See CIVIL PROCEDURE CODE (14).

Oudh Estates Act, ss. 2, 10 and 11 :—See HINDU LAW (13).

1. Patta, fresh tender, necessity of :—See MADRAS RENT RECOVERY ACT (6).

2. ——— illegal and indefinite stipulations in :—See MADRAS RENT RECOVERY ACT (4).

Pattas, tender of, within the fasli :—See LANDLORD AND TENANT (6).

Fatper application, scope of inquiry :—See CIVIL PROCEDURE CODE (32).

Payment absolute or conditional :—See NEGOTIABLE INSTRUMENTS ACT.

Payment by a benamidar of mortgage :—See BENAMIDAR.

— of purchase money on re-opening day valid :—See EXECUTION SALE.

1. Penal Code, ss. 43, 153 and 296—Highway—Religious procession—User—Vadagalais and Tengalais—Vadagalais forming separate *goshti*—Recital of prabandhams—Illegality—Lawful worship—Disturbance.

Where under a decree of the High Court the Tengalais were held entitled as against the Vadagalais to the exclusive right to the Adhyapakam Miras (such as reciting Tamil prabandhams) in the temple of Deepaparakasawami at Velakadi Koil and in the shrines attached thereto, and the Vadagalais were restrained from interfering with the Tengalais in the recital of the mantram and prabandham other-

wise than as ordinary worshippers and while the idol was going in a procession along a highway and the Tungalai goshti was reciting the prabandhams in front of the God, the Vadagalais on the suggestion of the District Magistrate, formed themselves into a separate goshti behind the idol and recited prabandhams separately and never desisted from doing so when the Tungalais being informed of this by persons whom they kept to watch the Vadagalais asked them to desist :—

Held by the Full Bench (overruling the Chief Justice and following Bhashyam Aiyangar, J.)

- (1) that the act of the Vadagalais was not in contravention of the decree, which reserves to the Vadagalais the exercise of their rights as ordinary worshippers ;
- (2) that the said act was not "illegal" within the meaning of Ss. 153 and 48 of the Indian Penal Code ;
- (3) that the Vadagalais in forming goshti and reciting prabandhams separately could not be said to be acting 'wantonly' or 'malignantly' within S. 153 as they were induced so to act by the action of the District Magistrate ;
- (4) that as the two goshtis were a considerable way apart and the Tungalais could hear little or nothing of what was going on in the rear (i. e., of what was being recited by the Vadagalais), there was no "disturbance" of the worship of the Tungalais within the meaning of S. 296, Indian Penal Code, by the mere fact that the Vadagalais recited prabandham (in Tamil) separately without reciting Vedam in Sanskrit.

Per Subrahmaniam Aiyar and Bhashyam Aiyangar, JJ. :—

- (1) The Tungalais cannot be said to have been engaged in "lawful worship" within the meaning of S. 296 when they were going in a procession in a highway and reciting prabandhams ;
- (2) Using the highway as a place of worship or carrying on procession in a highway is not a legitimate user of it as a highway.

Per Arnold White, C. J., and Benson, J. :—

It cannot be said that the Tungalais were not lawfully engaged in religious worship within the meaning of S. 296 by the mere fact that they were engaged in it in a highway.

Per Benson J. :—

- (1) Using highways for religious procession is a lawful user,
- (2) Even a dedication of the highway with the reservation of rights of persons to go in religious procession may be presumed in India.

Per Bhashyam Aigangar, J.

Such a reservation cannot be presumed but must be proved.

Vijayaraghavachariar v. The Queen, 26 M. 554 171

2. ——— **Ss. 104 and 442** :—*Suspected person—Police constable—Right to enter house—House-trespass—Pushing police out of house—Right of self defence.*

A police officer is not justified by the mere fact that a person is of a suspicious character to enter his house at midnight and see whether he is in the house. The act of the police officer in so entering the house is a house-trespass for which the police officer will be responsible under S. 442 of the Penal Code as the act is calculated to annoy the members of the family of the suspected person and also to insult the latter person.

The suspected person will be justified under S. 104 in inflicting slight harm upon the police-officer, viz., in pushing the police constable out from the house.

Doraswami Pillai v. The King Emperor 285

3. ——— **Ss. 374 and 442** :—*Zemindar and ryot—Zemindar entitled to share in crops—Removal by ryot without payment to Zemindar—Dishonest intention—Property before delivery.*

A ryot in a zemindary holding on a varam tenure in taking away the crops reaped by him without paying the Zemindar's share is not guilty of theft under S. 374, C. P. C., as he does not take away anything out of the possession of the Zemindar.

But if the ryot remove the crops dishonestly or fraudulently, i. e., with a view to defeat the Zemindar's right to be paid a share in the crops, the ryot is guilty of an offence under S. 424, Penal Code. Whether a Zemindar acquires property in the share due to him before delivery :—*Quære.*

Subudhi Rantho v. Balaram Padhi, 26 M. 481 123

Penalty :—*See CONTRACT.*

Person interested in making payment.—*See HINDU LAW (4).*

Plantain plantation—Purchase of.—*See MORTGAGE (5).*

Pleader's fee :—*See LEGAL PRACTITIONERS ACT.*

Pleadings :—*See NEGOTIABLE INSTRUMENTS ACT (2).*

Pledgee of moveables, right of :—*See CONTRACT ACT (4).*

Police Constable's right to enter house :—*See PENAL CODE (2).*

Possessory title, effect of :—*See SPECIFIC RELIEF ACT (2)*

1. **Practice.**—*Costs—Discretion—Interference by Appellate Court.*

Per Subramania Aiyar, J.—The discretion of the Courts below in the matter of awarding costs cannot be interfered with by the High Court on second appeal.

Per *Davies, J.*—The uniform practice of courts in this Presidency is to award costs only on the amount decreed to plaintiff. *Velu Pillai v. Ghose Mahomed, I. L. R., 17 M. 293* referred to. Where the award of costs by the courts below was against this practice it may be set aside.

Periakaruppan v. Palaniappa. 210

2. —————Costs :—See TRUSTEE AND CESTUI QUE TRUST.

Prayer for injunction amounts to one for possession :— See CIVIL PROCEDURE CODE (18).

Presumption as regards giving of a negotiable instrument :—
See NEGOTIABLE INSTRUMENTS ACT.

————— **of revocation of will**—Will—Not found at the time of testator's death—No presumption of revocation in India.

Where a will is shown to have been in the possession of the testator at some time before his death but is not found at the time of his death, there is no presumption that the will has been revoked by the testator.

Chidambara Pillai v. Swaminathan 135

Privy Council practice.—Special leave to appeal.

Special leave to appeal may be granted where the point is a new or moot one and is important and arguable.

Where the Governor-in-Council of Bombay to whom an appeal lay from the Court of the Political Agent at Kathiawar has dismissed an appeal overruling the contentions which are precisely similar to those raised by a petitioner, the latter is entitled to ask for special leave without previously appealing to the Governor-in-Council of Bombay.

Kathiawar Agency Case 154

Probate Act V of 1881, S. 2 :—Indian Succession Act, 331—Sikh a Hindu—Jains and Sikhs governed by Hindu Law—Lapse from orthodox practice—Hindu becoming a Brahmo.

Jains are governed by the Hindu Law in the absence of custom varying that law.

Sikhs are governed by the Hindu Law, and Courts applied such law to them because they were included under the term "Hindu" within the meaning of the Regulations which secured to the people of India the maintenance of their ancient laws, not because of the alternative rule of justice, equity and good conscience.

The term "Hindu" in S. 331 of the Indian Succession Act X of 1865 includes a person who is a Sikh.

The Probate Act, V of 1881, is Procedure Act and "Sikh" is : Hindu within the meaning of the said Act, S. 2.

A Sikh or a Hindu by becoming a Brahmo does not necessarily cease to belong to the community in which he is born.

A lapse from the standard orthodox practice binding upon a Sikh or Hindu in matters of diet and ceremonial observance cannot have the effect of excluding from the category of Hindu in Act V of 1881 one who was born within it and who never became otherwise separated from the religious communion in which he was born.

Rani Bhagwan Kuar v. Bose ... 381

1. Provincial Small Cause Courts Act IX of 1887.—*Suit for meane profits—Not cognizable by Court of Small Causes.*

A suit for the recovery of meane profits is not a suit cognizable by a Court of Small Causes.

Sacarimuthu v. Aithirum Rarthar, I. L. R., 25 M., 103 followed.

Innasi Muthu and Thomas v. Savuthia Pillai ... 136

2. Arts. 11 and 38.—*Junior member of a tarwad—Claim against Karnavan to enforce rights in respect of tarwad property—Suit cognizable by Small Cause Court.*

A claim by the junior members of a tarwad against the karnavan to enforce their rights to participate in the joint enjoyment of the tarwad property according to a family karar is not "a suit relating to maintenance" within the meaning of Art. 38, Schedule II of Act IX of 1887, but is "a suit for the enforcement of a right to or interest in immoveable property" of the tarwad and is not cognizable by a Court of Small Causes under Art. 11, Schedule II of Act IX of 1887.

Achutan Nair v. Kunjunni Nair... 499

3. Sch. II, Art. 13.—*Suit for cess—Small Cause nature—Second Appeal—Rent Recovery Act. S. 4.*

A suit for recovery of land-cess is not governed by Art. 13 of Act IX of 1887, and is therefore a suit of a small cause nature and no second appeal will lie from a decree passed therein if the value is less than Rs. 500. Land-cess can be included as rent under S. 4 of the Rent Recovery Act.

Zemindar of Tarla v. Latchiah ... 211

4. Art. 18.—*Provincial Small Cause Courts Act (IX of 1887), Schedule II, Art. 18—Editor of newspaper—Appointment under trust-deed by author of trust—Suit for salary provided in trust-deed—Suit not cognizable by Court of Small Causes.*

A suit for salary due under a trust-deed by the editor of a newspaper appointed as such under the same trust-deed is a suit to enforce the performance of the trust and is, therefore, not cognizable by a Court of Small Causes.

Subramania Iyer v. Dorasamy Tetrar, 26 M. 368 ... 22

Purchaser of share of a joint family member when entitled to bring a suit for partial partition.—*See HINDU LAW (6).*

Redemption decree, extension of time.—*Discretion.*

Plaintiffs who have not applied for redemption in the proper time on the view now held to be erroneous in the Full Bench case of

Vedapuratti v. Vallabhu Valia Raja that a second suit for redemption was maintainable, may apply for an extension of time, and it will be in the proper exercise of the Court's discretion to grant such extension.

Subapathy Patter v. Murukhan 266

——— **right of puisne mortgagee after decree on prior mortgage.**—See
SUIT BY PRIOR MORTGAGEE.

——— **Suit.**—See CIVIL PROCEDURE CODE (11).

Registered instrument, non-production of:—See RELIGIOUS
ENDOWMENT (2).

1. Registration Act, Ss. 3 and 17:—See SPECIFIC PERFORMANCE.

2. ——— (III of 1877), S. 17:—*Darkhast for lease—Endorsement granting application—Lease not exceeding five years nor reserving rent exceeding Rs. 50—Compulsory registration—Incidents attached by custom, effect of, on registration.*

The criterion for the necessity of registration of a document is what is expressed on the face of document and not what incidents attach by custom to a transaction of the kind mentioned in the document.

Whereupon a darkhast application for the grant by lease of certain lands the manager of the temple to which the lands belonged made an endorsement granting the application and the endorsement was communicated to the applicant.

Held—(1) that such endorsement was an agreement to lease and was subject to the provisions of the Registration Act as if it were a lease;

(2) that such agreement in terms not purporting to be for a period exceeding 5 years and not reserving a rent exceeding Rs. 50 per annum, did not require registration under the Registration Act;

(3) that the fact that by custom, if any, a lease of this kind would entitle the grantee to hold permanently did not render registration necessary.

Ramasamy Aiyar v. Thirupathi Naick 356

3. ——— S. 17, cl. (b).—*Agreement amongst partners giving one of themselves sole right to redeem mortgaged partnership premises—Document creating right in immoveable property—Registration, necessity of—Evidence, admissibility in—Necessity of further assurance if registered.*

Where a partnership agreement contained a clause that one of the partners should be solely entitled to redeem the mortgaged immoveable property belonging to the partnership, such document should be compulsorily registered under S. 17, cl. (b) as the right created by the clause is a right in immoveable property. If not registered, it is inadmissible in evidence. Where it is registered, a declaration of the right by the Court after contest is sufficient, and it is not

necessary to make an order directing the execution of any further instrument.

Maung Po Hti v. Mahomed Cassim ... 329

4. ————— **Ss. 17 and 49.**—*Authority to adopt—Writing—No will—Direction that adopted son should take possession—Registration—Oral evidence—Evidence Act, S. 91.*

A will is a testamentary disposition of property.

A document containing an authority to adopt is not a will, and the mere fact that there is a direction in the document that the adopted son should be put in possession of the property does not constitute such direction a devise of property,

An authority to adopt which is in writing and not contained in a will must be compulsorily registered under Ss. 17 and 49 of the Registration Act.

Quære :—Whether oral evidence is admissible when an authority to adopt compulsorily registrable is not registered.

Somasundra Mudali v. Durasami Mudaliar ... 283

5. ————— **S. 21.**—*Power of attorney—Document being of two descriptions—Gift and appointment of guardian—Document operative as to the appointment of guardian—Death of executant before registration—Gift inoperative—Registration of document so far as regards appointment of guardians—Description of property to be managed.*

A document which is in part an appointment of the guardian of the person and property of certain minors is not a document relating to immoveable property within the meaning of S. 21 of the Registration Act any more than a power of attorney authorizing an agent to collect rents of immoveable property is.

Such a document can be compulsorily registered although it contained no description of the properties referred to in it.

Where a person executes a deed of gift but dies before it is registered the gift is incomplete and the legal representatives of the donor cannot be compelled to complete such incomplete gift.

Where a document is in part operative but is inoperative as to the rest, the document may be registered as to the part that is operative, but the registrar must add a declaration that it is only as regards the part that is operative that registration will take effect.

Amirtham v. Muthukumara Chetty ... 303

1. **Religious Endowments.**—*Hereditary office—Trustee of a public religious institution—Office of trustee vested in several persons—Senior and junior branch—Management by turns—Transfer by junior branch in writing registered—Absence of instrument of transfer—Secondary evidence—Junior branch excluded for over 12 years—Acquisition by prescription—Holding of members of senior branch—Adverse enjoyment—Scheme proper to be framed—Civil Procedure Code, S. 539—Management by turns of office of trustees of public institution—Proper scheme.*

Where by a document in writing four members of a junior branch transfer their right of management of a public temple to a member of the senior branch, and such document is admittedly unstamped and unregistered, in the absence of such instrument of transfer, other evidence in proof of such transfer is inadmissible.

Quære :—Whether a member can rely upon such transfer as the basis of his title.

Raja Varma v. Ravi Varma, I. L. R., 1 M. 235; *Kuppa v. Dorasami*, I. L. R., 6 M. 76; *Narayana v. Runga*, I. L. R., 15 M. 183; *Alagappa v. Sivarama Sundara*, I. L. R., 19 M. 211; and *Annasami v. Ramakrishna*, I. L. R., 24, M. at p. 200 referred to.

Where there were two branches consisting of four members each of a branch being entitled to management in rotation or by turns of a public temple or religious institution, and the four members of the junior branch transferred their right to a turn of management to a member of the senior branch, and such member enjoyed the turns of the transferors for a period of nineteen years, he acquires a right by prescription and the right of the junior members to a turn of management is barred either under Art. 124 or 127 or 142.

Possession of office by one trustee during his turn is neither exclusive nor adverse to the other trustees.

The acting or executive trustee for a year or period holds the office and discharges the duties thereof on behalf of all the co-trustees and not on behalf of himself alone. *Attorney-General v. Holland*, 47 R. R., 476 referred to.

But where the members of the junior branch are excluded and their turns are exclusively taken by a member of the senior branch, the enjoyment by the other members of the senior branch with knowledge that the junior branch is excluded is not for the benefit of such junior branch and each member of the senior branch holds the office during his turn on behalf of himself and the other members of the senior branch and to the exclusion of the junior branch.

Where under such circumstances the office of trustee and the properties of the temple have been, for more than 12 years, held and possessed by the members of the senior branch as a whole body, such possession is adverse to the members of the junior branch as a body and the rights of the latter will be, by the operation of S. 28, extinguished.

Where several trustees enjoy the office by turns for a long time, a right to manage by turns is not acquired by them merely by the operation of limitation.

Venayak v. Gopal, I. L. R., 27 B. 357 referred to.

It is competent for co-trustees of a public religious institution to settle by arrangement among themselves a scheme of management by each of the co-trustees in rotation whether emoluments are attached

Religious Endowments—Continued.

Page.

ed to the office or not. Such a scheme ought to be upheld as being an equitable and proper arrangement by a court acting under S. 539, C. P. C.

But such a scheme is only subsidiary to the interests of the institution, and the arrangement for such a scheme may be set aside when it is injurious to the interests of the trust or institution.

Ramanathan Chetti v. Murugappa Chetti... .. 341

2. ———— Dedication of idol and land—Public religious purpose—Founder of idol constituting himself dharmakarta—Gift—Transfer of Property Act, 122—Meaning of 'donee'—Declaration of trust—Trust Act II of 1882, Ss. 1 and 5—Denial of execution—Registration, effect of.

A dedication of an idol and land for the building of a temple for the same is not a gift within S. 122 of the Transfer of Property Act.

The word "donee" in that section refers to an ascertained or ascertainable person or persons by whom or on whose behalf the gift can be accepted or refused and has no application to an unascertained number of persons such as the public.

A declaration of trust in relation to immoveable property for a public religious purpose is not governed by the Indian Trusts Act which by S. 1 is declared inapplicable to a religious endowment.

Where the plaintiff found an idol in his land and executed a document in favour of the idol to the effect that a piece of land belonging to him was given by him to the idol for a temple being built on it, that he had no objection to a permanent temple being built on it and that he bound himself to be the Dharmakarta of the idol, but did not register it and upon its being presented for registration denied execution and the document was compulsorily registered.

Held—(1) That there was a dedication of the land to the public

(i. e., as a public religious institution).

(2) That it did not require registration under S. 122, T. P. Act.

(3) That there was no transfer of property, the plaintiff only constituting himself a Dharmakarta.

(4) That it was a declaration of trust in relation to immoveable property.

(5) That such declaration of trust was for a public religious purpose.

(6) That, therefore, the Indian Trusts Act II of 1882, S. 5, had no application.

(7) That the transaction not being a gift within the meaning of S. 122, Transfer of Property Act, nor a trust within the meaning of the Indian Trusts Act, the refusal to register the document and denial of execution before the Registrar did not take away the effect of dedication and the registration under the Registration Act.

Pallayya v. Ramavadhani 364

Remand, power of District Judge in appeal from judgment in suit, under Rent Recovery Act :—See CIVIL PROCEDURE CODE, (2). Page.

1. **Res Judicata** :—See CIVIL PROCEDURE CODE (8).

2. ————— : See CIVIL PROCEDURE CODE (4).

3. ————— : See CIVIL PROCEDURE CODE (6).

4. ————— *Decision as to legality of resumption—Judgment in second appeal—Subsequent suit between same parties.*

A decision in a suit as to the legality of a resumption which has become final by judgment passed in second appeal is *res judicata* in a suit subsequently heard between the same parties and involving the same question.

Venkata Narasimha Appa Row v. Sobhanadri Appa Row ... 134

5. ————— **not affected by non-production of documents** :—See CIVIL PROCEDURE CODE (1).

5. ————— **in execution proceedings** :—See DECREE EXECUTION.

7. ————— **in reversioner's suit** :—See CIVIL PROCEDURE CODE (5).

8. ————— **not affected by mistake of law** :—See CIVIL PROCEDURE CODE (7).

Revenue purchase by mortgagee, effect of :—See TRANSFER OF PROPERTY ACT (4).

————— **purchase by mortgagor, effect of** :—See TRANSFER OF PROPERTY ACT (4).

————— **sale of patta land for arrears due on defaulter's lands effect of** :—See MADRAS REVENUE RECOVERY ACT (3).

Revisioner's right to question adverse possession :—See HINDU LAW (10).

Revision :—See DISTRICT MUNICIPALITIES ACT.

————— **under S. 622** :—See CIVIL PROCEDURE CODE (32).

Right of self-defence, pushing Police out of house :—See PENAL CODE (2).

————— **to use highway for religious processions** :—See PENAL CODE (1).

Resumption of grant :—See GRANT BY GOVERNMENT, EFFECT OF.

Ryotwari land, extinguishment of title in :—See LIMITATION ACT (1).

Sale for a sum of money and sale for a covenant to pay, difference between :—See TRANSFER OF PROPERTY ACT (3).

Security for costs in Letters Patent Appeals :—See CIVIL PROCEDURE CODE (39).

Several attachments—Sale in pursuance of one—Sale set aside under Page.

S. 310-A—Revival of other attachments—Waiver.

Where a sale held in execution of a decree is set aside under S. 310-A by payment to the decree-holder who brought the property to sale, the attachment made at the instance of other decree-holders is not thereby cancelled.

Where, by way of caution, a decree holder who has previously attached the property of his judgment-debtor asks for re-attachment, he does not thereby abandon or waive the original attachment especially when he refers to the prior attachment as subsisting and asks for re-attachment only if the court should deem it necessary.

Mahomed Sha Khan Sahib v. Srinivasulu 221

Sikh a Hindu :—See PROBATE ACT V OF 1881.

Small cause nature :—See SUIT OF A SMALL CAUSE NATURE.

Special leave to appeal :—See PRIVY COUNCIL PRACTICE.

Specific performance—Agreement to renew Kanom—Subsequent purchaser with notice—Rights of purchaser to eject—Specific performance.

Where there is only an agreement to renew a kanom (or mortgage) for 12 years and the owner sells the property to a third person who purchases with notice of the prior agreement, such third person can sue to eject the person who is in possession and who is entitled to get the kanom renewed under the agreement notwithstanding the fact that the person in possession would be in time at the institution of the suit for suing for specific performance of the prior agreement.

Ramasami Pattar v. Chinnan Asari, 1. L. R., 24 M. 462; and *Maddison v. Alderson*, 8 A. C. 474, followed.

Quere :—Whether an agreement to renew a kanom is not an agreement to lease, and if so a lease within S. 3 of the Registration Act requires to be registered under S. 17.

Achutan Nambudri v. Koman Nair 217

1. Specific Relief Act, S. 9—Civil Procedure Code, S. 647—Decree for possession—Order in Execution—Appeal—Applications for execution—Proceeding in suit—Standing crops—Purchaser from trespasser—Right to stay delivery.

An order passed in execution of a decree passed under S. 9 of the Specific Relief Act is not appealable.

Applications for execution of decrees are proceedings in suits. *Thakur Pershad v. Sheikh Fakir Ullah*, L. R., 22 L. A., 46 (50) and S. 647, C. P. C., referred to.

A decree-holder entitled to possession of land is entitled to the land and the standing crops thereon, and a purchaser of the crops from a trespasser is not entitled in law or equity to an order deferring the handing over of the land to the decree-holder until the growing crops have been gathered.

Thomas Souza v. Gulam Moidin Beuri, 26 M. 438 214

Specific Relief Act—Continued.

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2. ————— S. 9.—Possessory title—Prior possession—Dispossession—No authority of true owner—Plea of *Jus tertii*—Suit for possession after six months.

Possession is a good title against all but the true owner.

Asher v. Whitlock (1805), L. R. I Q. B. D. 1; *Sundar v. Parvati*, I. L. R., 12 A. 51; *Isma'il Ariff v. Mahamed Ghous* (1890), I. L. R., 20 C. 834; and the dictum of *Subramania Aiyar, J.*, in *Mustapha Sahib v. Santha Pillai*, I. L. R., 23 M. 167 followed.

Prior possession for any time short of the statutory period will entitle the holder to a decree for recovery of possession in a suit brought more than six months after dispossession, provided the defendant is a trespasser and cannot establish any title to the disputed land.

A trespasser or a wrongdoer cannot plead *jus tertii* unless he can show that the act complained of was done by the authority of the true owner. The effect of S. 9 of the Specific Relief Act is only that if a summary suit be brought within the time prescribed by that section the plaintiff therein who has been dispossessed otherwise than in due course of law will be entitled to be reinstated even if the defendant who thus dispossessed him, be the true owner or a person authorized or claiming under him but a decree in such a suit will not have the force of *res judicata* on the question of title.

Nisa Chand Gaita v. Kanchiram Bagari, I. L. R., 24 C. 572 dissented from.

Narayana Row v. Darmachar, 26 M. 514 ..

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3. ————— Ss. 21 & 57.—Civil Procedure Code, S. 403—

Positive covenant not capable of specific performance—Negative covenant—Perpetual injunction—Principles applying to grant of temporary injunction—Judicial discretion—Offer by defendants' counsel—Absence of suggestion that offer will not be carried out—Defendants' financial position.

A perpetual injunction may issue in a case where there has been a breach of a negative covenant, although a positive covenant (from which the negative covenant may be inferred) may be incapable of specific performance.

S. 57, Specific Relief Act, is general and is not confined to case, of contracts which are specified in S. 21, cl. b.

Under S. 57 the plaintiff will be entitled to an injunction only when he has not failed to perform his part of the contract. But when the failure of the plaintiff is due to the defendants' default in not performing the contract, it does not lie in the mouth of the defendant to say that the plaintiff is not entitled to an injunction by reason of the latter's default or failure.

A temporary injunction is regulated by the provisions of S. 403, C. P. C., and under that section the granting of an *ad interim* injunction is a matter of discretion—though judicial.

Specific Relief Act—Continued.

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Quere :—Whether the granting of a temporary injunction is to be regulated by the principles applicable to the granting of a perpetual injunction under the Specific Relief Act.

Nusserwanji Merwanji Panday v. Gordon, 1 L. R. 6 B. 265 referred to.

An injunction may be rightly refused on account of the plaintiff's conduct in refusing an offer made by the defendants at the bar unless having regard to the financial position of the defendant there is reasonable apprehension that the offer will not be carried out.

Subba Naidu v. Badesha Sahib, 26 M. 168 13

4. ————— **S. 42** :—See CIVIL PROCEDURE CODE (3).

5. ————— **S. 42** :—See LIMITATION ACT (8).

Sub-mortgagee's rights to proceeds of sale :—See MORTGAGE (2).

1. **Succession Act, ss. 96 and 128.**—*Hindu will in town of Madras—Legacy to child—Child appointed as executor—Death of child before testator leaving lineal descendant—Claim of child's lineal descendant to legacy.*

S. 96 of the Indian Succession Act which is made applicable to Hindu wills in the Town of Madras, applies to a case where the legatee predeceases the testator whether such legatee is named as executor or not.

S. 128 can only apply when the executor survives the testator.

So when a bequest is made to a child of the testator and the latter appoints such child as one of his executors and the child predeceases the testator leaving a lineal descendant, such lineal descendant of the child will be entitled under S. 96 to claim the legacy notwithstanding that his executor is not able to prove the will or otherwise act as an executor by reason of his death and S. 128 has no application.

Ramasami Iyah v. Kuppusami Iyah 351

2. ————— **S. 381** :—See PROBATE ACT.

Suit against certified purchaser :—See CIVIL PROCEDURE CODE (30).

— **by prior mortgagee without puisne mortgagee party, effect of.**—*Prior and puisne mortgagees—Suit by prior mortgagee—Puisne mortgagee no party—Purchase by prior mortgagee in execution of decree upon his mortgage—Rights of prior and puisne mortgagees—Prior mortgagee's right to recover possession—Puisne mortgagee's right to redeem—Redemption amount—Price of equity of redemption.*

Where a prior mortgagee brings a suit upon his mortgage without making the puisne mortgagee a party and in execution of the decree obtained in such suit purchases the mortgaged property he is not entitled to recover possession without redeeming the puisne mortgagee in possession.

Suit by prior mortgagee.—*Continued.*

Venkata Somayajulu v. Kannam Dhora, 1. L. R., 5 M. 184 followed.

The second puisne mortgagee is also entitled to redeem the prior mortgagee whether the latter's omission to implead the former in his suit is wilful or in ignorance of the existence of the second mortgage. The amount which the puisne mortgagee is to pay for redemptions is not the price paid by the prior mortgagee for his purchase of the equity of redemption but only the amount which he may have had to pay if made a party to the suit by the prior mortgagee.

Rangasamy Naicken v. Jellibodi Naicken, 26 M. 484

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Suit by vendee for damages—Futile prayer for possession:—

See **SUIT OF SMALL CAUSE NATURE** (2).

Suit for annuity is suit of a Small Cause nature:—See **SUIT OF A SMALL CAUSE NATURE** (3).**Suit for declaration of title to immoveable property:—**See **LEGAL PRACTITIONERS ACT** (2).**Suit for mesne profits:—**See **PROVINCIAL SMALL CAUSE COURT ACT** (1).

———— **bare declaration:—**See **LIMITATION ACT** (8).

———— **partial partition when maintainable:—**See **HINDU LAW** (6).

———— **recovery of land cess cognizable by Small Cause Court:—**See **PROVINCIAL SMALL CAUSE COURTS ACT** (3).

———— **not cognizable by Court of Small Causes:—**See **PROVINCIAL SMALL CAUSE COURTS ACT** (4).

1. Suit of a Small Cause nature:—See **PROVINCIAL SMALL CAUSE COURTS ACT** (3).**2. ——— Vendee's suit for possession against third parties—Failure of vendor to get possession—Suit against vendor for possession or for damages—Futile prayer—Small Cause nature.**

Where a purchaser of some land sued third parties for possession of the land and failed ultimately and afterwards brought a suit against his vendor for being placed in possession or for damages.

Held:—(1) that the prayer for possession was a futile one and could not be given effect to;

(2) that the suit must be regarded as one for damages merely;

(3) that such suit was cognizable by a Small Cause Court and that, therefore, no second appeal lay.

Venkataramanuja Reddiar v. Subbaraya Pillai 299

3. ——— Suit for annuity—Allowance not in satisfaction of any right of maintenance.

Where a person allows maintenance to his sister not by way of satisfaction of her right of maintenance but the allowance is to be paid

Suit of a Small Cause nature—Continued.

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out of the income of her own property which she transfers to her brother, the same is an annuity and a suit for the recovery thereof is maintainable by a Court of Small Causes.

Saminatha Pandaram v. Kuppu Udayan 471

Suit to enforce charge in contribution cases :—*See* MADRAS REVENUE RECOVERY ACT (1).

Theft of crops by tenant, when :—*See* PENAL CODE (3).

Time for performance when varied :—*See* CONTRACT.

Tirupani cess.—*Voluntary payment for a number of years—Implied contract.*

Where a cess is unconnected with a tenant's holding and is essentially of a voluntary character, its continuous payment for a number of years is not a ground for implying that there was a legal contract or obligation to continue to pay it.

A 'tiruppani' cess is of such a character.

Ramalingam Chettiar v. Ramasami Aiyar 379

Title of Official Assignee to debt :—*See* CIVIL PROCEDURE CODE (24).

Title to sue in the name of trustees :—*See* MADRAS REVENUE RECOVERY ACT (2).

Transfer of criminal case from one Presidency Magistrate to another :—*Case pending before a Presidency Magistrate—Transfer to another Presidency Magistrate.*

Quære :—Whether the High Court can transfer a case from one Presidency Magistrate to another Presidency Magistrate both being members of one and the same court.

In re Murugesu Mudaliar 69

Transfer of immoveable property in compromise of claims :—*See* TRANSFER OF PROPERTY ACT (1).

1. Transfer of Property Act :—*Transfer of immoveable property—Compromise of claims—Sale, gift exchange—Writing unnecessary.*

A transfer made in compromise of a claim is neither a sale nor a gift nor an exchange and no writing is necessary under the Transfer of Property Act to validate the same though such transfer may relate to immoveable property.

Where land belonging to the plaintiff's sister was sold by plaintiff and his brothers to a stranger and certain other land belonging to the family was allowed by the plaintiff and his brothers to be retained and enjoyed by the sister and excluded from the family partition.

Held (1) that the sister acquired a good title to the same and

(2) that the plaintiff could not get any share in the same.

Tiruvengidachariar v. Ranganatha Aiyangar 500

Transfer of Property Act—Continued.

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2. ————— **S. 6** :—*Hindu Law—Reversioners interest in estate, alienability of—Spes successionis—Validity a transfer—Transfer to widow—Enlargement of estate—Surrender.*

The interest of a reversioner in an estate when the widow (limited owner) is alive is a mere expectancy or *spes successionis* and is not transferable either by way of sale, mortgage or otherwise under S. 6 of the Transfer of Property Act.

Bahadur Singh v. Mohar Singh, I. L. R., 24 A 94 referred to.

It does not make any difference as regards the invalidity of such transfers that the transfer is made by the reversioner to the widow. Such a transfer does not enlarge the widow's limited estate into an absolute estate and is not analogous to a renunciation made by the widow in favour of the presumptive heir.

Where the transfer is made after the reversion falls in such transfer is valid and operative.

Narasimham v. Madhavarayudu 323

3. ————— **S. 55 (4)** :—*Sale of estate—Unpaid purchase money—Vendor's right to a charge—Nature and origin of vendor's lien in a court of equity—Contract to the contrary—Charge in possession giving up possession—Effect of agreement to pay in instalment—Sale for a sum of money and sale for a covenant to pay—Apportionment—Certificate granting leave to appeal to Privy Council—Civil Procedure Code, Ss. 595 (b) and 600.*

Where a vendor of immoveable property entitled to a lien for the unpaid purchase-money enters into possession of the property he holds the same as a charge on the property and having an interest in its preservation.

Under S. 55 (4) of the Transfer of Property Act a vendor of immoveable property is entitled to a statutory right to a charge upon the property in the hands of the purchaser or those claiming under him for unpaid purchase money unless it can be shown that either by express terms or by necessary implication there is clear contract excluding the right to such charge.

A mortgagee or chargee who is in possession of an estate as such and gives up possession to the person entitled to the same subject to his charge upon payment of what is then due to him is not precluded from afterwards asserting his right against the estate for further instalments or payments becoming due to him.

The Law of India, speaking broadly, knows nothing of the distinction between legal and equitable property in the sense in which that was understood when equity was administered by the Court of Chancery in England.

Transfer of Property Act.—Continued.

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The charge which a vendor obtains under the Transfer of Property Act is a statutory charge and different in its origin and nature from the vendor's lien created by the courts of equity to an unpaid vendor.

The vendor's lien was a creation of the Court of Equity and could be modified according to the circumstances of the case by the Court of Equity.

The statutory charge given to the vendor under the Transfer of Property Act can only be excluded by contract, and English cases can be useful in such a case only for the purpose of illustration.

Such a charge is not excluded by a mere personal contract to defer payment of a portion of the purchase-money or to take the purchase-money by instalments or by any contract, covenant or agreement with respect to the purchase-money which is not inconsistent with the continuance of the charge.

An agreement upon the part of the purchaser to pay the purchase-money in certain instalments with interest is not "a contract to the contrary" within the meaning of S. 55 (4), Transfer of Property Act and is not inconsistent with the existence of a charge to the vendor for the amount of the instalments and interest becoming due from time to time.

There is a distinction founded upon principle and authority between a conveyance or sale in consideration of *covenant* to pay a sum of money in the future and a sale in consideration of *money* which the purchaser covenants to pay. In the former case there is "a contract to the contrary" expressed in the conveyance itself which excludes the statutory charge on the property.

The vendor has a statutory right of charge upon the whole estate sold by him and for the whole balance due to him irrespective of the fact that a portion of the estate was subsequently sold by the purchaser to a third person, and it is not open to a court in a suit by the chargee to enforce his charge to apportion the amount due under the charge between the original purchaser and his assignee.

Where the amount or value of the suit and of the matter in appeal to the Privy Council was more than Rs. 10,000 and the decree of the High Court appealed from affirmed the decision of the court immediately below the High Court which passed the decree and a certificate is given for leave to appeal to the Privy Council stating that the case was otherwise a fit one for His Majesty in Council such a certificate is correct in form and satisfies the provisions of the law.

Such certificate is given pursuant to S. 595, Cl. (c) and the latter alternative of S. 600, Q. P. C.

Transfer of Property Act.—Continued.**Page.**

Rajah Tasaduq Rasul Khan v. Manika Chand, L. R. 30 I. A. 35, distinguished.

Webb v. Macpherson 389

4. ————— **S. 65** (c).—*Regulation X of 1831—Mortgagor and mortgagee—Mortgagor in possession—Default in payment of revenue—Revenue sale—Mortgagor not purchaser—Mortgagor buying from purchaser at revenue sale—Rights of mortgagee—Taking advantage of one's own wrong.*

Where the defaulter is a minor, and arrears of revenue have accrued during his minority, the estate of minor cannot be sold having regard to the provisions of Regulation X of 1831. But the estate descending to the minor from his father may be sold for arrears which became due during the life-time of the father.

A mortgagor in possession is under a duty to his mortgagee to pay the public revenue accruing due on the mortgaged property. [Transfer of Property Act, 1882, S. 65 (c)].

Where a mortgagor makes default in payment of public revenue due by him, suffers the property to be sold for such revenue and purchases the property at such revenue sale, the mortgage in favour of the mortgagee is not extinguished but still subsists, for the principle of law is that a man cannot be allowed to take advantage of his own wrong. The same is the case with a mortgagee in possession who on failing to pay the arrears of revenue payable by him upon the mortgaged property become himself the purchaser at the revenue sale brought about by his own default and the mortgagor has then a title by estoppel to redeem the mortgage as against the mortgagee.

The mere fact that the mortgagor who fails to pay the revenue due by him does not buy the property at the revenue sales does not affect the right of the mortgagee, if the mortgagor or his representative subsequently buys the mortgaged property from the purchaser at the revenue sale.

Lakshmayya v. Bollareddy, 26 M. 385 129

5. ————— **S. 88**—*Civil Procedure Code, Ss. 280 and 244, Cl. (c)—Decree for sale—Direction by appellate Court to take accounts—Application by decree-holder to Original Court—Order declaring amount due—Appeal.*

A decree for sale passed under S. 88 of the Transfer of Property Act is the final decree in the suit and all proceedings subsequent to that decree for the purpose of enforcing and working out such decree are proceedings in execution of that decree.

Transfer of Property Act.—Continued.

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A decree for sale under S. 68 may either declare the amount due on the mortgage at the date of such decree or direct that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage on a future day which is to be fixed by the decree itself.

Where a decree for sale under S. 88 directs accounts to be taken, an application which the decree-holder may make, for taking the account and declaring the amount which may be found due on the taking of such account is an application to enforce the decree within the meaning of S. 220, C. P. C. Such an application may be made to the Court which passed the original decree, and an order passed thereon is appealable as being one falling under S. 244, Cl. (c) of the Civil Procedure Code.

Aryan Bank of Vizagapatam v. Venkata Narasayamma, 26 M. 237 . . . 212

6. ————— **S. 68.**—*Mortgage document—One attesting witness not called—No objection taken in first Court—Raising of objection in appeal—Waiver.*

Where a mortgage document is tendered in evidence but an attesting witness was not called to prove execution as provided in S. 68 of the Transfer of Property Act and no objection is taken on that score in the first Court, it must be taken to have been waived and the objection cannot be taken up in appeal.

Ponnammal v. Kalithitha Moodelly 143

7. ————— **Ss. 82 and 100.**—*See MADRAS REVENUE RECOVERY ACT (1).*

8. ————— **Ss. 85 and 91.**—*Suit by one of several uralans for redemption of mortgage—Other co-uralans not asked to join.*

Under Sections 85 and 91 of the Transfer of Property Act one of several uralans is entitled to bring a suit for redemption of a mortgage without being under the necessity of alleging (much less of proving) that his co-uralan was asked and refused to join in the suit.

Edamanna v. Kannan Nayar, 26 M. 649 322

9. ————— **S. 122.**—*See RELIGIOUS ENDOWMENTS (2).*

10. ————— **S. 138.**—*See MORTGAGE (2).*

Transfer of suits from Regular to Small Cause Side.—*See JURISDICTION.*

Trust Act II of 1882.—*See RELIGIOUS ENDOWMENTS (2).*

Trust deed.—*See PROVINCIAL SMALL CAUSE COURT ACT (4).*

Trustee and cestui que trust—Wrongful withholding—Remission—Duty Page.
to invest—Trustee's right to insist on release—Costs.

A trustee improperly retaining possession of trust property after demand by *cestui que trust* entitled to possession is a mere wrongdoer and will not be justified in granting remissions of rent to tenants.

Where trust property consists of money and cannot be applied immediately or at an early date for the purposes of the trust, the trustee is bound to invest the money for the benefit of the *cestui que trust*.

Where a trustee standing in *loco parentis* to the *cestui que trust* was defraying the latter's expenses and expected that certain comparatively small amounts in his hands would be required in a few months for such expenses and the sums were in fact so expended:—

Held, that though the trustee might have invested with propriety the sums in the Savings Bank he was not guilty of a breach of trust in not so investing.

A trustee has no right to insist on the *cestui que trust* given him a release as a condition precedent to his delivered trust property and will therefore be mulcted in costs even though he *bona fide* believed that he had such right.

Rajaram Devai v. Lakshmi Sankara 206

Trusts for Public Religious Purposes:—See RELIGIOUS ENDOWMENTS
 (2).

Vendor's lien nature and origin of:—See TRANSFER OF PROPERTY ACT
 (3).

Visagapatam Agency Tracts Rule XXXI, Act XXIV of 1839,
S. 4.—Agency Rules—Rule ultra vires—Grant for maintenance—Attachment.

It was competent for the Governor-in-Council acting under S. 4 of Act XXIV of 1839 to reserve any control in himself over the agents and their subordinates in the exercise of their judicial powers.

The enactment of a Rule XXXI by the Governor-in-Council providing that petitions received by the Governor against the orders of the Agent and his Assistant with respect to execution of decrees be referred to certain authorities is not *ultra vires*.

The Provisions of the Civil Procedure Code, do not apply to the Agency Tracts.

A grant of land made to a widow for her maintenance is not exempt from attachment under Rule XXXI, Cl. (2).

Maharaja of Jeypore v. Neladevi 151

Waiver of objections as to proof of document.—See TRANSFER OF PROPERTY ACT (6).

— original attachment:—See SEVERAL ATTACHMENTS.

Words, meaning of :—“Avasyamai Chodikumhole” or Page.
“Avasyamai Vendumhole”.—See KANOM (2).
 ——— “on emergency”:—See KANOM (2).

Zemindar and Ryot—Relinquishment by ryot—Grant by Zemindar of
relinquished land to another ryot—One patta for both lands—Rights of
permanent occupancy—Presumption—Kudivaram.

In the case of lands held by a ryot it is upon the Zemindar to show that the Kudivaram vested in him and that the ryot possesses no permanent rights of occupancy.

Venkatanarasimha Naidu v. Dandamudi Kotayya, I. L. R., 20 M. 299 followed.

Where a ryot relinquishes the patta lands in which he has permanent rights of occupancy to the Zemindar and the latter grants the land to another ryot holding other lands over which he has permanent rights of occupancy and both lands are entered in the same patta.

Held (1) that the Zemindar must show that he has made the grant under circumstances entitling him to eject at the end of any year, and (2) that the ryot possesses right of permanent occupancy in respect to the relinquished lands granted to him.

Chekati Zemindar v. Ranasoru Dhora, I. L. R., 23 M. 318 followed.

Raja Venkata Narasimha Appa Row Bahadur v. Nootulapati Parvatulu ... 81

Zemindar's title to crops :—See PENAL CODE (3).

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Mangab Thuppan	...	...	...	Appellant*
				(Plaintiff).
v.				
Kadir Kutti and others	...	...	...	Respondents
				(Defendants).

Property subject to mortgages—Assignment by mortgagor—Undertaking by assignee to redeem prior mortgages—Part failure of consideration—Assignee entitled to sue for redemption.

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Where the consideration for an assignment by a mortgagor of property which is the subject of certain prior incumbrances is partly the undertaking by the assignee to redeem the prior mortgages and partly the payment of cash, the assignment is good and the assignee is entitled to sue for redemption of the prior mortgages notwithstanding that there may be a failure of consideration as to the cash payment.

Second appeal from the decree of the Subordinate Judge's Court of South Malabar at Calicut in A. S. No. 72 of 1900, presented against the decree of the Court of the District Munsif of Betanad in O. S. No. 228 of 1899.

Plaintiff obtained a mortgage from the 6th defendant and agreed to discharge out of a portion of the mortgage amount several prior mortgages and to pay the balance in cash to the mortgagor. Plaintiff brought the suit to redeem one of the prior mortgages and his suit was dismissed by the lower Courts on the ground that the plaintiff did not pay the balance of the mortgage amount.

C. V. Ananthakrishna Aiyar for *P. R. Sundara Aiyar* for appellant.

P. K. Nambiar for respondents.

The Court delivered the following

JUDGMENT:—The decrees of the lower Courts cannot be upheld. The 6th defendant was not a necessary party to the suit. On the strength of Exhibit B, which appears to be nothing but a melkanom, the plaintiff is entitled to redeem the prior mortgages. There

* S. A. No. 1071 of 1900.

12th March 1902.

is at all events consideration for Exhibit B to the extent of the undertaking there given to redeem the prior mortgages. We accordingly set aside the decree of the Subordinate Judge and dismiss the suit against the 6th defendant throughout on the ground that she was not a necessary party but without costs and give the plaintiff a decree with costs throughout against defendants 4, 5 and 7 for redemption of the kanom of the 13th December 1880 (Exhibit A) on payment into court of the kanom amount Rs. 99 together with Rs. 63-4-0 as compensation for improvements within six months from this date and also for rent against the 4th and 5th defendants from date of plaint to date of payment at ten paras of paddy a year.

Present :—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

v.

Venkatarama Gurraju Respondent
(Defendant).

Ramayya *Mortgage—Covenant to pay in instalments—Provision that mortgagee is entitled to possession if after the last instalment falls due anything remains due under the mortgage—Mortgagee entitled to bring a suit for sale on the personal covenant.*
Venkatarama Gurraju.

Where under a mortgage document the amount is payable in certain instalments and the mortgagor personally covenants to pay as each instalment falls due, the mortgagee is clearly entitled to sue for each instalment and recover the same by sale of the mortgaged property and personally from the mortgagor; and this right is not curtailed by the fact that there is a further provision in the mortgage-deed that the mortgagee is entitled to take possession of the mortgaged property if at the end of the date fixed for the last instalment the debt remained wholly unsatisfied.

Second appeal from the decree of the District Court of Godavari in A. S. No. 782 of 1899 presented against the decree of the Court of the District Munsif of Ellore in O. S. No. 915 of 1896.

In this case the District Munsif passed a decree for sale and gave a personal decree for any balance that might remain unsatisfied after sale. The District Judge set aside the personal decree on the ground there was no personal covenant contained in the mortgage deed. The deed provided for the payment of

13th March 1902.

the debt and interest in ten annual instalments on specified dates, and went on to say that "I have consented to pay the various instalments on the various dates," that in default of payment enhanced interest should be paid, and that "*should the mortgage debt remain wholly unsatisfied at the end of the date fixed for the last instalment, the mortgagor would, without objection, place the mortgagee in possession of the properties mortgaged to him.*" The passage in italics was relied on by the District Judge as showing that the mortgagee should look to the land alone for his money. Hence this second appeal.

Ramayya
v.
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Gurraju.

P. S. Sivaswami Aiyar for appellant.

V. Ramesam for respondent.

The Court delivered the following

JUDGMENT :—It is clear from a perusal of the document that there is an express personal covenant to pay as each instalment falls due. The fact that at the termination of the period on which the last instalment falls due in 1905, it is provided that if any sum still remains due possession is to be given of the mortgaged property cannot deprive the plaintiff of his right to sue for each instalment as it falls due and recover the same by sale of a portion of the mortgaged property and personally from the defendant.

We allow this appeal with costs in this Court and the lower appellate Court, set aside the decree of the District Judge and restore that of the District Munsif in its entirety.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*,

Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Rangasami Konan ... Appellant*
(Plaintiff).

v.

Sellaperumal Padayachi and others ... Respondents
(Defendants).

Purchase of plantain plantation—Lease of land to purchaser by vendor—Mortgage of plantation by purchaser—Termination of lease—Rights of mortgagee to plantain trees.

Where a person absolutely purchased a plantain plantation and got a lease of the land on which the plantation was standing, a mortgagee of the plantation from

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such purchaser would be entitled to the security of the plantain trees notwithstanding that the lease of land to his mortgagor might have been determined.

Appeal under section 15 of the Letters Patent presented against the judgment of Mr. Justice Moore dated 24th September 1901 in S. A. 427 of 1900 presented against the decree in A. S. No. 431 of 1898 on the file of the Subordinate Judge's Court of Negapatam against O. S. No. 60 of 1897 on the file of the Court of the District Munsif of Valangiman.

The facts of the case are stated in the judgment of *Moore, J.*, reported in 11 M. L. J. 340. The judges of the Division Bench having differed, this appeal was preferred under the provisions of the Letters Patent. The only fact omitted in that judgment which is worth stating here is that the 3rd defendant himself took a mortgage of the trees in 1877, which was discharged 12 years later in 1889.

P. R. Sundaraiyar (with *K. Srinivasa Aiyangar*) for appellant :
In 1877 the 3rd defendant sold the subsisting plantation and leased the land for 3 years. Even after the lapse of 3 years defendants 1 and 2 continued as lessees and were owners of the plantation. The 3rd defendant who took a mortgage of the trees for his purchase money in 1877 was paid 12 years later in 1889, thus showing that the plantation still continued in the lessees. [*Bhashyam Aiyangar, J.*—How long does a plantation last?] I understand it lasts for even 50 or 60 years. Fresh shoots are springing, and while the main tree is cut down, the fresh shoots grow up into trees. Thus it goes on for a long time. [*Bhashyam Aiyangar, J.*—Any other vegetables grown on the land?] It must be so. But there is no evidence about it. Again, the 3rd defendant got an assignment of the last mortgage of 1892, and in execution of a decree for sale obtained thereon, consented to the sale of the plantation subject to the prior claim of the plaintiff. [*Bhashyam Aiyangar, J.*—The whole question is whether the trees were purchased or leased to defendants 1 and 2?] It is a purchase, but even if it were a lease the plaintiff is entitled to recover. In the lease of 1877 are found the words சாஸனம் வாங்கி (having taken a sale-deed). That clearly shows that the plantation was purchased. In the plaint mortgage also we find “மேல்பலனாகிரயத்துக்கு வாங்கி” மேல்பலன் being the trees. [*Bhashyam Aiyangar, J.*—Who will take a mortgage of the trees, if they did not belong to the

mortgagors]. The third defendant himself took a mortgage which remained unpaid for a number of years. He subsequently takes an assignment of the mortgage of 1892. Throughout the defendants are treated as owners of the trees and not as lessees. The view of *Moore, J.*, and of the Courts below that at the termination of the lease the trees went to the landlord is erroneous.

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Even if the trees belonged to them only as lessees, they will be entitled to remove them before the end of the tenancy. On the date of the attachment and sale by the third defendant, the first two defendants continued as lessees and had the right to remove the trees if asked to quit. The lessees' interest was purchased by the landlord himself and the two interests cannot merge and vest in the landlord as my intermediate mortgage was outstanding. The landlord as being in the tenant's shoes would still be bound to redeem me and cannot put an end to the tenant's right of removal as against me. [*Bhashyam Aiyangar, J.*—However, we need not now go into that question].

T. V. Seshagiri Aiyar, for respondent : Ex. II recites that the plantains on 1,100 gulis were sold. Ex. A shows that the plantains on 1,600 gulis were mortgaged to plaintiff. (*Bhashyam Aiyangar, J.*—Suppose it was an actual sale of a part of the land, namely, the trees. Is there any doubt that the plaintiff's claim is good ?) It all depends on a recital in a document. There is no proof that there was a sale of the trees. [*Bhashyam Aiyangar, J.*—You never questioned the fact of sale]. The District Munsif speaks of it as a lease of the trees and not as a sale. Again the trees that were hypothecated have ceased to exist. These are fresh trees growing from the shoots of the old ones. [*Bhashyam Aiyangar, J.*—Take the pledge of a cow. If the cow dies after giving birth to calves, would not the pledge be of the calves also ?] It is not so clear that the charge can be enforced against the calves. [*Bhashyam Aiyangar, J.*—The case of trees is stronger still as the trees have a continuous existence ; what do you say as to the admission in the claim proceedings ?] There is no estoppel. An admission in the claim proceedings will not even be acknowledgment. See I. L. R., 6 M. 205, I. L. R., 12 M. 207. [*Bhashyam Aiyangar, J.*—If subsequent to claim proceedings the claim has become barred, you may plead it now]. That is what I do. [*Bhashyam Aiyangar, J.*—

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If the trees were sold, what is the bar?] Those trees are dead. The new ones are not affected by the hypothecation. [*Bhashyam Aiyangar, J.*—That you never pleaded. As a matter of law you said the hypothecation would not bind the shoots. You never said this was not the plantation sold.]

It is for the plaintiff to have alleged that this plantation is subject to his charge. [*Bhashyam Aiyangar, J.*—They said that this was the plantation purchased by the mortgagors. That means the same plantation continued. You did not deny it]. Again there is really no difference between this case and that where a plantation is leased. [*Bhashyam Aiyangar, J.*—There is a difference. By purchase of plantation he has become owner of a part of the land and he is lessee of the residue]. The trees on the land are not those hypothecated. As to whether the plantation continued and so the same now as it was then will have to be inquired into. [*Bhashyam Aiyangar, J.*—This is not a case in which a new plea should be allowed to be raised. Nor is the matter in contest such as to warrant an elaborate inquiry which a new plea will necessitate].

P. R. Sundra Aiyar, in reply: As to the plantation on 500 gulis, that seems to have been subsequently purchased. However I am content to take the plantation on 1,100 gulis.

The Court delivered the following

JUDGMENT:—In 1877 the 1st defendant purchased out and out certain plantain trees from the party from whom he took on the same day a lease of the land upon which the trees were growing. In the recital to the lease deed the trees are described as the “entire plantain plantation on 1,100 gulis.” In 1887 the 1st defendant purported to mortgage the trees on 1,600 gulis. At the time of the mortgage the 1st defendant was certainly the absolute owner of the trees on 1,100 gulis. As regards these trees the plaintiff acquired the rights of a mortgagee and his rights were not affected by the fact that in 1896 the 1st defendant’s lease was determined.

The plaintiff is entitled to a decree for Rs. 177-4-0 with interest at 12 per cent per annum from November 6, 1887, by the sale of the plantain trees on the 1,100 gulis as described in Exhibit II.

The plaintiff is entitled to his costs throughout payable by 3rd defendant.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*,
Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Lakshminarayana Reddyar Appellant*
v. (Defendant).
Subhadri Ammal Respondent
(Plaintiff).

Contract Act, ss. 23 and 25 (2)—Pro-note given during illegal cohabitation—Presumption of immoral consideration—Plea of immoral consideration—Plea of failure superfluous—Onus of proof—Shifting of proof—Failure of plaintiff to prove consideration immaterial.

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Where the defendant admitted execution of a promissory note in favor of the plaintiff, a woman, but pleaded that as it was for the purpose of future cohabitation the consideration was illegal, the onus of proof lay upon the defendant to prove such a case.

There is no presumption that a promissory note given during cohabitation is given only in consideration of future cohabitation and is therefore given for immoral consideration.

Where the judge, after hearing the defendant's evidence upon his plea, decides to hear also the plaintiff's evidence, he does not by the mere fact of hearing the plaintiff's evidence rule that the burden of proof is shifted to the defendant.

Where there was no plea of absence of consideration and the defendant failed to prove his case of illegal consideration, there must be a decree on the promissory note against him, notwithstanding that the plaintiff might not have proved her case, *vis.*, that there was an advance of cash at the time of the promissory note.

Where the plea is that consideration is immoral, a plea that there was a failure of such consideration is immaterial and superfluous as the agreement itself will be void under S. 23, Contract Act.

Semle :—Per Arnold White, C. J. A presumption that a pronote is given for immoral consideration may arise where the note is given after a breaking off of immoral relations, and is the outcome of a renewal of such relations.

Semle :—Per Bhashyam Aiyangar, J. A promise made in consideration of past cohabitation is valid under the Indian Contract Act, S. 25, cl. 2.

Mankuar v. Jasodhkuar¹ and Dhiraj Kuar v. Bikra Majit Singh² referred to.

Appeal from the decree of Boddam, J., sitting in the original side of the High Court of Madras, in C. S. No. 32 of 1901.

Eardley Norton, K. Venkataalingam and James Short for appellant.

Allan Daly, C. Ranganadham Naidu and Thirumalai Pillai for respondent

¹ O. S. A. 29 of 1901.
1. I. L. R., 1 A. 478.

15th August 1902.
2. I. L. R., 3 A. 787.

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The Court delivered the following

JUDGMENTS:—*The Chief Justice* :—The plaintiff sued on a promissory note executed in her favor by the defendant. The execution of the note was admitted by the defendant. The defendant's plea was that he executed the note in consideration of an undertaking by the plaintiff that the plaintiff would bring her daughter to the defendant's village in South Arcot, and put her under his protection as his concubine during the rest of her life, and that she (the plaintiff) failed to carry out the undertaking. The issue was "was the consideration for the plaint promissory note immoral, and is it void for failure of consideration as alleged in the written statement?" It seems to me that the latter portion of the issue is unnecessary. If the defendant was able to show that the consideration for the note was immoral, the question whether the consideration failed or not would be immaterial.

At the trial the execution of the note having been admitted by the defendant, and the onus being on him, he went into the box for the purpose of proving his plea of immoral consideration, and certain witnesses were examined on his behalf. At the close of the defendant's case it was submitted on behalf of the plaintiff that the defendant had proved no case. The learned judge declined to stop the case at that stage and the plaintiff and her witnesses were examined. It was argued on behalf of the appellant that the learned judge by declining to stop the case at the close of the evidence of the defendant and his witnesses, in effect ruled that the burden of proof had become shifted and that it thus became incumbent on the plaintiff to show, by affirmative evidence, that consideration had been given for the note. It is perfectly clear that the learned judge never ruled and never intended to rule that as the result of the evidence adduced on behalf of the defendant the burden of proof had shifted. He allowed the case to go on because he thought it desirable to hear the whole of the evidence before deciding the issue which he had to determine. Having heard the whole of the evidence, he came to the conclusion that the defendant had failed to discharge the burden which lay on him of proving, affirmatively, that the note had been given for an immoral consideration. The Judge no doubt holds that the plaintiff failed to prove her allegation that she had given cash and jewels for the note. I need not stay to consider whether on the evidence I should

have come to the same conclusion as the learned judge with reference to the plaintiff's testimony, as it certainly does not follow that because the plaintiff failed to prove her case that the defendant must be taken to have established his. The question to be determined was not—was the consideration of future cohabitation with the plaintiff's daughter, as alleged by the defendant, or hard cash, as alleged by the plaintiff, but had the defendant proved affirmatively that the consideration for the note was future cohabitation with the plaintiff's daughter.

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Chief Justice.

No doubt, the defendant denies that there was any criminal intimacy between himself and the plaintiff's daughter before the execution of the note, but to my mind the evidence establishes beyond all doubt (in fact this was not seriously contested by the learned counsel for the defendant) that there had been immoral relations between the defendant and the woman for some years before the execution of the note, that these relations were subsisting at or about the time of the execution of the note and that they continued after the execution of the note.

It was urged that when a note is given during the continuance of cohabitation, there is a presumption that the consideration, in part, if not wholly, is future cohabitation. This is not so. No such presumption arises from the mere fact that a promise is made during the continuance of cohabitation. In referring to the case of *Hill v. Spencer*,¹ Kay, J., says in *In re Vallance*²: "This amounts to a distinct decision that the mere continuance of cohabitation raises no kind of presumption that a bond given during such cohabitation was given for an immoral consideration." It would no doubt be otherwise if there had been a breaking off of immoral relations and a renewal of them as the outcome of a promise to pay; but there is not a shred of evidence to show anything of this sort took place in the case before us.

I think the learned Judge was right in holding that the defendant failed to prove the plea which he set up, and I think this appeal should be dismissed with costs.

Moore, J.:—I concur.

Bhashyam Aiyangar, J.:—This is an appeal by the defendant in a suit brought by the payee, against the maker, of a negotiable

1. 4 Amb. 641.

2. 26 Ch. D. 353 at p. 357.

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promissory note, payable on demand, (dated 15th August 1898), for the sum of Rs. 5,000 with interest at 12 per cent. per annum. The making of the note is admitted and the defence to the suit is, not absence of consideration, but that the consideration was immoral, viz., an undertaking by the plaintiff (payee) to bring her daughter to the residence of the defendant (maker) and put her under his protection as his concubine during the rest of her life—and that such consideration failed. The issue framed in the case runs as follows :—“ Was the consideration for the plaint promissory note immoral and is it void for failure of consideration as alleged in the written statement.” If the consideration be immoral, it is perfectly immaterial whether or not there was failure of such consideration, for the contract itself is void (section 23 of the Indian Contract Act) and the latter part of the issue may, therefore, be left out of consideration as being superfluous.

The onus being on the defendant he opened the case. In his evidence as his own 1st witness, he deposed as follows as to the consideration for the note :—“ The plaintiff promised to bring her daughter to me and let her remain with me. It was for that, I executed the pro-note. My note was given as security for bringing her daughter and leaving her with me, for fear, I should desert her daughter.” He also examined three more witnesses who profess to have been present at the making of the note and who substantially corroborate the defendant's version as to the consideration for the note. According to this version—which materially differs from and is inconsistent with the plea set up in the written statement—the pro-note was given by the defendant as a guarantee that he would not desert the plaintiff's daughter after she has been brought to live with him as his concubine, and in the event of his so deserting her, the plaintiff was to be entitled to sue him upon the note. Notwithstanding this variance and inconsistency between the plea set up and the evidence adduced in support thereof, the case was argued on behalf of the defendant both in the Court below and before us in appeal, on the footing that the consideration for the note was defendant's future co-habitation with the plaintiff's daughter in his own residence at Nellikuppam. Defendant, in his evidence, distinctly denies past cohabitation with the plaintiff's daughter—a married woman who separated in fact from her husband about two years prior to the date of the note. He says that his

sexual intercourse with her commenced only some time after the making of the pro-note and that for about 20 months prior to the suit he was now and then visiting her in her residence in Madras, where she was living with her mother, the plaintiff, and that subsequent to the date of the pro-note, he has given her, in the aggregate, jewels worth about Rs. 4,000.

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After the defendant closed his case, the plaintiff adduced rebutting evidence and it is necessary to refer only to the evidence of herself and her daughter. Both of them clearly prove that the defendant was in the habit of having sexual intercourse with the plaintiff's daughter for some years before the making of the pro-note and also thereafter; and they distinctly deny the presence of the defendant's 2nd, 3rd and 4th witnesses at the time and place of the making and delivery of the pro-note. I may say at once that I disbelieve the defendant's evidence that he had no improper intimacy with the plaintiff's daughter before the making of the pro-note and that such intimacy commenced only some time after the making of the note. I have no doubt that, as deposed to by the plaintiff and her daughter, the sexual relations between the latter and defendant commenced a few years before the pro-note and continued thereafter. I may also say that I discredit the evidence of defendant's 2nd, 3rd and 4th witnesses who say they were present when the pro-note was made and delivered.

Plaintiff and her daughter's evidence as to the consideration for the note is the payment in cash, by the plaintiff, of Rs. 2,000 and the value of certain jewels which had been entrusted by the plaintiff to the defendant, for sale, about a month prior to the making of the note. She says that her object was to invest the amount for interest with the defendant in whom she had confidence. The case therefore, practically rests upon the evidence of the defendant on the one hand and the evidence of the plaintiff and her daughter on the other. The onus being undoubtedly on the defendant, it will be impossible to give judgment for the defendant unless his evidence is believed as to the immoral nature of the consideration, and I cannot accede to the contention on behalf of the appellant that the defendant's evidence ought to be accepted if the plaintiff's version as to the consideration is rejected. Assuming that the plaintiff has not proved that she advanced the cash and

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the jewels as deposed to by her in her evidence, it by no means follows that the consideration for the note must be assumed to be immoral as deposed to by the defendant. As regards the plaintiff's version as to the consideration for the note, if the onus were upon her, I should not be prepared to find, upon the evidence of herself and her daughter, that she has proved the consideration for the note. But S. 118 of the Negotiable Instruments Act relieves her from such onus and I must say that there is nothing intrinsically improbable in her version of the transaction or in her having had the means to advance to the defendant the money and jewels referred to and I am not satisfied that her version is false. The argument of the learned Counsel for the appellant, on this part of the case proceeded on the assumption that the terms 'disproved' and 'not proved' in the Law of Evidence (See Section 3 of the Indian Evidence Act) are synonymous.

There being no plea of absence of consideration, the only question in the case is whether the consideration was immoral. The consideration cannot be held to be immoral unless the defendant's evidence is believed, *viz.*, that *future* cohabitation was the consideration and object of the pro-note. This is distinctly denied by the plaintiff and I am not prepared to accept the defendant's word for it. As already stated there undoubtedly was past cohabitation which has continued after the making of the note and the defendant himself deposes that subsequent to the pro-note, he gave the plaintiff's daughter jewels to the aggregate value of Rs. 4,000.

The pro-note will be illegal as tainted with immorality only if the consideration therefor be *future* cohabitation or both past and *future* cohabitation. In *in re Vallance*¹ it was held by Mr. Justice Kay that a mere continuance of the cohabitation was not enough to raise the presumption that the bond was given in consideration of future cohabitation, and accordingly the bond—on which the claim in that case was founded—was good. I may also refer to the case of the *Hire Purchase Furnishing Co. v. Richens*² in the Court of Appeal, in which Bowen, L. J., stated the law in the following terms:—"There is a broad principle that where a defendant is attempting to set aside a transaction for illegality and the facts connected with it are equally consistent with the transaction being legal or illegal, it lies on the defendant to prove the illegality. The

1. L. B. 26 Ch. D. 353.

2. L. B. 20 Q. B. D. 387.

law presumes against illegality and this presumption holds in all civil and other proceedings for whatever purposes originated." An agreement made with a woman upon the consideration of future illicit cohabitation—which under the Penal Code may be criminal—or one made with a third party, as in this case, for procurement of such cohabitation, is illegal and void. But a promise made in consideration of past illicit cohabitation is void for want of consideration under the English Law. There is, however, no illegality in such promise but merely absence of consideration and, therefore, according to English Law, if made in the form of a bond or covenant under seal, there is, *prima facie*, a valid contract (Leake on Contracts, 3rd Edition, p. 660).

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No plea of absence of consideration having been raised in this case, it is unnecessary to consider whether, as held by the High Court of Allahabad¹ in *Man Kuar v. Jasodha Kuar* and *Dhiraj Kuar Bikramajit Singh*², such a promise—though made without consideration—was valid under the Indian Law before the passing of the Indian Contract Act and is also valid and enforceable under Section 25 (2) of the Indian Contract Act. It is therefore not necessary to decide whether the view so taken is correct, but I express no dissent from it. The onus is cast by law on the defendant and on the ground that he has not discharged it by proving that the note was given for procurement of future illicit cohabitation with the plaintiff's daughter as alleged by him, the learned Judge was right in passing a decree in favour of the plaintiff for the amount due on the pro-note, whatever suspicion may attach to the transaction as being immoral and unrighteous. The appeal, therefore, fails and should, in my opinion, be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*,
and Mr. Justice Benson.

Subba Naidu and another ... Appellants* (1st & 3rd Defendants).

v.

Badsha Sahib and others ... Respondents (Plffs. and 2nd Deft).

Specific Relief Act, Ss. 21 and 57—Civil Procedure Code, S. 493—Positive covenant not capable of specific performance—Negative covenant—Perpetual injunction—Principles applying to grant of temporary injunction—Judicial discretion—Offer by defendants' counsel—Absence of suggestion that offer will not be carried out—Defendants' financial position.

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* O. S. A. No. 19 of 1902.

25th April 1902.

1. I. L. R., 1 A. 478.

2. I. L. R., 3 A. 787.

Subba Naidu v. Badsha Sahib. A perpetual injunction may issue in a case where there has been a breach of a negative covenant, although a positive covenant (from which the negative covenant may be inferred) may be incapable of specific performance.

S. 57, Specific Relief Act, is general and is not confined to cases of contracts which are specified in S. 21, cl. b.

Under S. 57 the plaintiff will be entitled to an injunction only when he has not failed to perform his part of the contract. But when the failure of the plaintiff is due to the defendants' default in not performing the contract, it does not lie in the mouth of the defendant to say that the plaintiff is not entitled to an injunction by reason of the latter's default or failure.

A temporary injunction is regulated by the provisions of S. 493, C. P. C., and under that section the granting of an *ad interim* injunction is a matter of discretion—though judicial.

Quære :—Whether the granting of a temporary injunction is to be regulated by the principles applicable to the granting of a perpetual injunction under the Specific Relief Act.

*Nusserwanji Merwanji Panday v. Gordon*¹.

An injunction may be rightly refused on account of the plaintiff's conduct in refusing an offer made by the defendants at the bar unless having regard to the financial position of the defendant there is reasonable apprehension that the offer will not be carried out.

Appeal from the Judgment of *Boddam, J.*, sitting on the original side of the High Court of Madras, in C. S. No. 49 of 1902.

W. Barton, R. F. Grant, and Branson and Branson for appellants.

E. Norton, K. Brown, and A. E. Rencontre for 1st to 3rd respondents, *The Hon. the Advocate-General, Allan Daly, and M. O. Alagasingarachariar* for 4th respondent.

The Court delivered the following

JUDGMENTS.—*The Chief Justice* :—This is an appeal from an order of Mr. Justice *Boddam* by way of an interlocutory or temporary injunction. On the 9th of June 1899, the plaintiffs and the defendants entered into an agreement, of which the provisions which are material for the purposes of the question now before the Court are as follows :—

Paragraph 1 says, "For the purpose of carrying on the said mica mining work the said firm shall advance to the said Ansur Subba Naidu, Mahomed Khyruddin Sahib and Madhina Kondappa Naidu to enable them to carry on the same the sum of Rs. 10,000 only without interest."

Paragraph 2 says, "that for these considerations the defendants agree to deliver at the godowns of the plaintiffs at Madras all mica produced by the mines worked by them as aforesaid."

Paragraph 6 says, "The defendants bind themselves to consign all mica produced by their mines worked by them to the plaintiffs upon the terms agreed to between the parties, and they bind themselves that they will not directly or indirectly either in their own names or in the names of their servants, relatives or others deliver for sale or dispose of otherwise or keep in stock anywhere outside the mines any mica produced from the mines worked by them or on their behalf to any one or other than the said firm for a period of nine years from the date of this agreement."

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Paragraph 20 says, "On the expiry of the period of nine years, the defendants will refund the amount of Rs. 10,000 advanced to them for carrying on all their mining work." On the 7th of November 1901 a mortgage agreement was entered into between the plaintiffs and the 1st and 3rd defendants. The mortgage agreement no doubt placed matters upon a new footing. But the mortgage agreement does not relieve the defendants from their positive obligation to consign all their mica to the plaintiffs during the currency of the agreement or from their negative obligation not to consign the mica to third parties during that period. Neither of these obligations are qualified or modified by the terms of the mortgage deed of November 1901. Now the injunction which has been granted by the learned judge is in these terms :— 'That the defendants, their agents and all persons claiming through or under them be restrained from moving, consigning, selling, alienating, or disposing of 231 cases of mica marked with certain letters now in the Madras Salt Cotaurs or elsewhere, and all or any such other mica as may be produced from the defendants' mines pending the further order of this Court.' Mr. Grant's first contention was this. He says that inasmuch as the positive covenant could not be enforced by a decree for specific performance, a breach of the negative covenant ought not to be restrained by an injunction. Now we are relieved from considering the question as to whether the positive covenant in this case can or cannot be specially enforced, because it is conceded by the counsel on behalf of the plaintiffs that it cannot. In this state of things therefore, it has to be considered whether under the law of this country a breach of the negative covenant not to consign to third parties can be restrained by injunction. The law with regard to the granting of permanent injunctions is regulated by the pro-

Subba Naidu v. Badsha Sahib. Chief Justice. visions of the Specific Relief Act. Section 56 says, "An injunction cannot be granted in certain specified cases including an injunction to prevent the breach of a contract, the performance of which would not be specifically enforced." That is clause *f* of section 56.

Section 57 says, "Notwithstanding section 56, clause *f*, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, expressed or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement, provided the applicant has not failed to perform the contract so far as it is binding on him." Then, section 54, which is the first section of Chapter X, which deals with perpetual injunctions is as follows:—

"Subject to the other provisions contained in or referred to by this chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favor of the applicant whether expressly or by implication. When such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II of this Act." Now some of the rules and provisions are to be found in section 21 which speaks of contracts which cannot be specifically enforced, and one of the contracts which under that section cannot be specifically enforced is referred to in paragraph *b*, "A contract which runs into such minute or numerous details, or which is dependant on the personal qualifications or volition of the parties, or otherwise from its nature is such that the Court cannot enforce specific performance, of its material terms," and Mr. Grant's proposition of law is that section 57 only applies to the case of contracts which are specified in section 21, clause (*b*). In other words he says that section 57 only applies to cases which I may describe compendiously as cases like *Lumley v. Wagner*¹. There is certainly nothing in the words of section 57 to suggest that so narrow a construction should be placed upon it. The section is really a proviso to section 56 which cuts down the operation of the preceding section. Mr. Grant has been unable to cite any decision of the Courts in this country in support of the proposition which he put forward, though no doubt there are expressions of opinion in the text-books which support his

1. 1 De. G. M. and G. 604.

proposition. The authorities, such as there are, are against the proposition which he invites us to adopt. Although the facts in *Madras Railway Company v. Rust*¹ are not precisely the same as those in the present case, it supports the view that section 57 means what it says and that it is not to be cut down as Mr. Grant suggests. That decision no doubt was only the decision of a single Judge. With reference to the point the learned Judge says, "It is argued that when the remedy by specific performance of a contract is expressly refused by Chapter II of the Specific Relief Act, then by virtue of section 54, clause 2, an injunction cannot be granted, and therefore that this contract being one extending over more than three years, and therefore not capable by section 21, clause (g), of specific performance cannot be the subject of an injunction. It seems to me that this argument would make section 57 of the Act a nullity." In that case Mr. Grant appeared as counsel and he advanced precisely the same argument which he advanced to-day. In that case the Court declined to adopt his argument and I think rightly. As regards the case of *Charlesworth v. MacDonald*², I do not think it can be said to afford us any assistance because the question in that case arose in Zanzibar where the Specific Relief Act has no application. With regard to Mr. Grant's contention that section 57 only applies to what I have described as cases like *Lumley v. Wagner*³, it has to be observed that one of the illustrations to section 57, viz., illustration (c), is a re-production of the decision in *Lumley v. Wagner*,³ but that it is only one of the five illustrations. The other illustrations relate to facts which are quite distinct from the facts which were in question in *Lumley v. Wagner*. That, I should have thought, was decisive as to the question whether the Legislature intended that section 57 should only apply to cases falling under section 21 (b). If the Legislature intended that section 21 should apply, nothing would have been easier than to have said so. It seems to me it may well be that the Legislature designedly adopted these general terms for the purpose of avoiding in this country the difficulties which have risen in the English Courts with regard to cases of this character—difficulties which resulted in the English authorities being somewhat confused and not altogether reconcilable.

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Chief Justice.

1. I. L. R., 14 M. 18. 2. I. L. R., 23 B. 103. 3. I. De. G. M. & G. 604.

Subba Naidu v. Badsha Sahib. Chief Justice. As regards section 57, it comes to this: can it be said that the applicant has failed to perform the contract as far as it is binding on him, because if he has failed to perform the contract so far as it is binding on him, then by the express words of the proviso to section 57 he will not be entitled to any relief. Now, what is the evidence before the Judge when he made the order which is sought to be set aside. First, he had the affidavit which was filed on behalf of the plaintiffs. I need refer to only one or two paragraphs. Paragraph 2 refers to the terms of the agreement, and the third paragraph says, "That the defendants consigned mica to us at Madras only up to November 1901, but have failed to consign any further mica, although I am informed and believe they have large quantities of mica collected and stored since that date." Paragraph 5 says, "That the 1st and 3rd defendants have entered into an agreement with one Venkatasubbiah to consign through him for sale all the mica produced in the defendants' mines." Paragraph 7 says, "In pursuance of the fraudulent agreement with the said person, the 1st and 3rd defendants have consigned for sale by him of mica which was produced by the defendants' mines since November 1901 consisting of about 231 cases or thereabouts and valued at Rs. 40,000 or thereabouts, and the said cases I am informed and believe have arrived by rail at the Salt Cotaurs, Madras, and marked (with certain letters) instead of the usual mark indicating my firm." These are the material allegations in the affidavit of the plaintiff. A very long affidavit was filed on behalf of the defendants. With regard to that affidavit I have not the least hesitation in saying that $\frac{1}{8}$ ths of it is wholly irrelevant to the question which we have to consider. I have given the best attention I can to this affidavit, and the conclusion I have come to is that it does not show that the plaintiffs failed to perform their contract in so far as it was binding upon them.

But having regard to the admissions which the defendants themselves make in the affidavit and reading the allegations in the affidavit filed on behalf of the plaintiffs by the light of these admissions, it seems to me that if the plaintiffs have failed to perform their part of the contract, their failure is the direct result of the deliberate breach of the contract by the defendants. If this is so, it does not lie in the mouths of the defendants to say that plaintiffs have failed to perform the contract so far as it was

binding upon them. But, as I have said, I think there is nothing on evidence to show that the plaintiffs failed to perform the contract so far as it was binding on them. Of course it has to be borne in mind that the injunction granted in the present case was not a permanent injunction, the law with regard to which is laid down in the Specific Relief Act, but a temporary injunction, the law with regard to which is regulated by the provisions of the Civil Procedure Code. Section 493, Civil Procedure Code, is quite general and says: "In any suit for restraining the defendant from the committing a breach of contract or other injury, whether compensation be claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right." The granting of a temporary injunction under the powers conferred by this section is a matter of discretion. True, it is a matter of judicial discretion. But if the court which grants the injunction rightly appreciates the facts and applies to those facts the true principles, then that is a sound exercise of judicial discretion. With regard to this part of the case, Mr. Grant contended that the issue of an interlocutory or temporary injunction is governed by precisely the same principles as the granting of a permanent injunction at the trial of the case, and in support of that proposition he referred to an observation of *Sir Charles Sargent* in *Nusserwanji Merwanji Panday v. Gordon*.¹ The observation is at page 279 of the report, and there the learned Judge says, "It is plain, however, that, apart from the special circumstances which determine whether the court should in its discretion grant an injunction before the hearing of the suit, the same general principles must equally apply to the granting of a temporary injunction as to a perpetual injunction, and those principles must, therefore, be sought in the Specific Relief Act itself." Now, having regard to the fact that the law with regard to the granting of a perpetual injunction is to be found in the Specific Relief Act and is laid down with great precision, and that the law with regard to the granting of a temporary injunction is to be found in the Civil

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1. I. L. R., 6 B. 266.

Subba Naidu v. Badsha Sahib. Chief Justice. Procedure Code and is declared to be a matter for discretion, if it were necessary to consider the point, I am not sure I should be prepared to go quite so far as *Sir Charles Sargent*. However, it is not necessary to consider that point now, because so far as this case is concerned I am prepared to go so far, and I say that the conduct of the plaintiffs has not been such that the court will decline to give them any relief by way of a permanent or temporary injunction. Here, can it be said that the conduct of the plaintiffs has been such as to disentitle them to an injunction. That has to be considered with reference to the allegations made in the affidavit filed on behalf of the defendants. With regard to that I do not desire to repeat the observation which I have made.

Various other grounds were urged by Mr. Grant as reasons why this injunction ought not to be allowed to go, and he referred to the offer which was made by the defendants at the bar. It has been decided at any rate in England that an injunction was rightly refused on account of the conduct of the plaintiffs in refusing an offer made by the defendants, there being no suggestion that the offer would not be carried out. The facts in that case are widely different from the facts in the present case. In the present case even if the offer is accepted, there is considerable doubt whether, having regard to the financial position of the defendants, the offer would in fact be carried out. Then Mr. Grant referred to the balance of convenience and he cited numerous English authorities in which it was held on the facts of those particular cases that the balance of convenience was not in favor of the injunction going. All I say with regard to this case is that on the evidence as it now stands I am not satisfied that the balance of convenience is not in favor of the injunction in the form in which it was issued. The matter is one of judicial discretion, and it seems to me the learned Judge in making the order did exercise a sound judicial discretion and his order was right. I think this appeal must be dismissed with costs of plaintiffs and 2nd defendant.

Benson, J.—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies and Mr. Justice Benson.

Kumarasami Goundan and another ... Appellants*
 (4th Defendant's
 v. representatives).

Kumarasami
 Goundan
 v.
 Nanjappa
 Goundan.

Nanjappa Goundan and others ... Respondents
 (Plaintiffs and Defen-
 dants 1, 2, 3 and 5).

Hindu Law—Gift or assignment by grandfather I, binding nature of, as against grandsons—Grandsons claiming in their own right and not as heirs of the grandfather—Suit for cancellation not necessary.

Where an assignment of certain property by the grandfather is invalid as against his grandsons, the latter are entitled in their own right as co-parceners to recover the property and are not bound to sue for cancellation of the invalid assignment in the first instance.

Appeal from the decree of the Subordinate Judge's Court of Coimbatore in O. S. No. 29 of 1899.

Defendants 1, 2 and 3 were the owners of the plaint property. They mortgaged the same on 9th August 1882 to Nanjappa Goundan, the paternal grandfather of the plaintiffs. In a partition suit between Nanjappa's sons, plaintiff's father was declared entitled to $\frac{3}{4}$ share of this mortgage debt and the 5th defendant to $\frac{1}{4}$ share under certain conditions which remained unfulfilled until suit. Nanjappa Goundan shortly before his death fraudulently and without consideration assigned the mortgage to his sister. Plaintiffs now sue for recovery of the money due under the mortgage by sale of the hypotheca impugning the assignment as sham and invalid. Defendants 1 to 3 pleaded that the plaintiffs had no right to recover, as their grandfather, the late Nanjappa, assigned the debt to his sister, and that upon her death the 4th defendant, the sister's heir, demanded payment and that they therefore sold the mortgaged property to the 4th defendant in discharge of the debt. The 4th defendant contended that the assignment was true and valid and that the plaintiffs could not maintain this suit without cancelling the assignment even if it should be invalid as against the plaintiffs and that the plaintiffs' right of suit for cancellation was barred by lapse of time. The District Judge held that the assignment was sham, that plaintiffs were not bound to sue for

* A. No. 21 of 1901.

5th August 1902.

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Goundan.

cancellation. He, therefore, gave a mortgage-decree in favour of plaintiffs and 5th defendant. Hence this appeal by 4th defendant.

S. Kasturiranga Aiyangar for appellant.

S. Kasturiranga Aiyangar for appellant.

P. S. Sivaswami Aiyar for 1st and 2nd respondents.

The Court delivered the following

JUDGMENT :—We agree with the Subordinate Judge that no consideration for the deed of assignment Exhibit A has been proved, and that it was not necessary for the plaintiffs to sue for the cancellation of that instrument as they do not claim as heirs of their grandfather, but in their independent right as co-parceners in the property which he attempted to wrongly alienate (*Unni v. Kunchi Amma*¹.)

The appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :--Mr. Justice Bhashyam Aiyangar.

[illegible]

Doraisami Tevar and others ... Respondents
(Defendants).

Subramani Iyer v. Doraisami *Provincial Small Cause Courts Act (IX of 1887), Schedule II, Art. 18—Editor of newspaper—Appointment under trust-deed by author of trust—Suit for salary provided in trust-deed—Suit not cognizable by Court of Small Causes.*

A suit for salary due under a trust-deed by the editor of a newspaper appointed as such under the same trust-deed is a suit to enforce the performance of the trust and is, therefore, not cognizable by a Court of Small Causes.

Petition under Section 25 of Act IX of 1887, praying the High Court to revise the decree of the Subordinate Judge's Court of Madura (West) in S. C. Suit No. 964 of 1901.

Plaintiff was the owner of a press in Madura and was conducting a newspaper. The newspaper ceased to exist and plaintiff appears to have been desirous of selling the press. The Ramnad Raja bought the press and executed a trust-deed on 27th July 1893 by which the press was vested in trustees for the benefit of the Madura Public and the newspaper was to be re-started and the plaintiff was to be the editor of the newspaper on a salary of Rs. 100 a month.

6th August 1902.

1, I. L. R., 14 M. 26.

The plaintiff resigned his appointment on 11th October 1898 and brought this suit against the trustee for salary due to him from the date of the trust to the date of resignation. The suit was filed in the small cause side. The Sub-Judge dismissed the suit holding that plaintiff was not entitled to any salary. Hence this revision petition.

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Iyer
v.
Doraisami
Tevar.

S. Srinivasa Aiyangar for petitioner.

P. S. Sivaswami Aiyar for respondents.

This petition coming on for hearing, the Court delivered the following

JUDGMENT:—This suit clearly falls under article 18 of the second schedule to Act IX of 1887 being a suit relating to a trust. The plaintiff was appointed by the author of the trust and not by the trustees as editor, and relying upon that appointment he claims that the defendants as trustees should carry out the direction in the instrument of trust and pay him his salary as therein provided until his resignation. If the plaintiff, therefore, has any cause of action, it is to enforce the carrying out of one of the directions in the instrument of trust, *i. e.*, to enforce the performance of the trust in so far as it relates to the plaintiff. In this view the plaint should have been returned to be presented to the proper court, and it is accordingly now ordered to be returned. The revision petition is otherwise dismissed but without costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Boddam and Mr. Justice Bhashyam Aiyangar.

Raja Simhadri Appa Row ...Petitioner* in all cases (*Defendant*).

v.

Ramachandrudu ...Respondent* in C. R. P. No. 403 of 1901 (*Plaintiff*).

Civil Procedure Code, Ss. 13 and 586—Decision in regular side as to rate of rent—No second appeal maintainable—Subsequent suit in small cause side—Court of competent jurisdiction—Res-judicata.

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Appa Row
v.
Rama-
chandrudu.

A decision as to the rate of rent due to the landlord in a former suit would be *res judicata* and the operation of this principle would not be rendered nugatory by the fact that there was no second appeal under S. 586, C. P. C., from such decision.

*Ahmed v. Moidin*¹ followed.

A decision passed by the Munsif on the regular side may be *res judicata* in a subsequent suit filed before the same Munsif on the small cause side. The District

* C. R. P. No. 403 and other connected petitions.

15th August 1902.

1. I. L. R., 24 M. 444.

Raja
Simhadri
Appa Row
v.
Rama-
chandrudu.

Munsif on the regular side of his court is, within the meaning of S. 13, C. P. C., a court of jurisdiction competent to try the small cause suit, though by reason of the prohibition in the Provincial Small Cause Courts Act, a regular court cannot try a small cause suit if there is a Small Cause Court capable of trying it.

Petitions under Section 25 of Act IX of 1887 praying the High Court to revise the judgments and decrees of the Court of the District Munsif of Tenali in S. C. Suits Nos. 241 to 243, 245 to 247, 249, 248, 251 to 262 and 266 to 270 of 1901 respectively.

S. R. Ramasubba Aiyar and *K. N. Aiya Aiyar* for petitioner.

P. S. Sivaswami Aiyar and *C. Venkatasubbaramiah* for respondents.

These petitions coming on for hearing the Court delivered the following

JUDGMENT:—The decision of the Court of Appeal in O. S. No. 1 of 1897 on the file of the District Munsif of Gudivada that the rate of rent for the class of lands now in question is Rs. 6 per acre is clearly *res judicata* in favour of the landlord, the defendant in this suit, and the fact that by virtue of Section 586, C. P. C., no second appeal lay to the High Court in that case, does not make such decision inoperative as *res judicata* in the present suit (*Ahmed v. Moidin*¹). The contention that, as the former suit was a regular suit and the present only a small cause suit, the decision in such former suit cannot operate as *res judicata* in the present suit because the District Munsif of Gudivada cannot take cognizance on his regular side of this suit which is a Small Cause Suit is manifestly untenable. Under the Small Cause Courts Act a suit cognizable by a Small Cause Court is not to be instituted and tried by an ordinary Civil Court if, and so long as, within the local limits of its jurisdiction, a Small Cause Court is established competent to take cognizance of such Small Cause Suit. But that circumstance does not within the meaning of Section 13 of the Code of Civil Procedure make the ordinary Civil Court, *viz.*, in this case the Court of the District Munsif of Gudivada on his regular side, a Court which is not a Court of jurisdiction competent to try the present suit. The decrees of the lower Court are therefore reversed and the suits dismissed with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmanya Aiyar and Mr. Justice Davies.

Vaikuntam Ammangar ... Appellant* (*Plaintiff*).

v.

Kallapiran Aiyangar... ... Respondent (*Defendant*).*Contract Act, s. 69—Hindu Law—Griha Pravesam and Rithusanti expenses—Person interested in making payment—Girl's mother.*Vaikuntam
Ammangar
v.
Kallapiran
Aiyangar.

Griha Pravesam (entering the husband's house) and *Rithusanthi* (nuptials) are essentially connected with the disposal of a Brahmin girl in marriage and form part of the marriage ceremonies, and a person who takes by survivorship the share of the deceased in undivided property is bound to perform such ceremonies for the daughter of the deceased. The mother of the girl incurring such expenses is a person interested in making the payment and is entitled to recover them from the person in possession of the joint property under s. 69, Contract Act.

Second Appeal from the decree of the District Court of Tinnevely in A. S. No. 188 of 1900, presented against the decree of the Court of the District Munsif of Srivaikuntam in O. S. No. 359 of 1898.

The parties were the same as in the case reported in I. L. R., 23 M. 512. The case there reported was in respect of expenses incurred by the mother for the marriage of the daughter. Subsequently the mother incurred expenses for *Grihapravesam*, *Dipavali*, *Kartigai*, *Rithusnanam*, and *Rithusanti*, and brought the present suit to recover them from her brother-in-law. The Court of first instance granted a decree in respect of all the items claimed on the ground that such expenses were incurred in accordance with the custom of the country. The District Judge reversed the decree of the District Munsif and dismissed the suit on the ground that there was no legal obligation to pay these expenses. Hence this second appeal.

T. R. Venkataramasastri for *P. S. Sivaswami Aiyar* for appellant.

A. K. Sundaram Aiyar for *M. R. Ramakrishna Aiyar* for respondent.

Vaikuntam
Ammangar

v.
Kallapiran
Aiyangar.

The Court delivered the following

JUDGMENT :—That the defendant was liable to be charged with the expenses for the marriage of the plaintiff's daughter was decided in the previous case (*Vaikuntum Ammangar v. Kallapiran Aiyangar*¹). So the only question before us is whether the expenses herein claimed, which were subsequently incurred, are legitimate marriage expenses. Upon the authorities it is perfectly clear that the ceremonies of *Griha Pravesam* and *Ritusanti* are essentially connected with the disposal in marriage of a girl of the Brahmin caste and invariably form a part of the marriage ceremonies. The circumstances that all the ceremonies are not now conducted consecutively as of old, does not affect the liability to pay for them by the person responsible in law to meet the charges connected with the girl's disposal in marriage, who in this case is the defendant. The amount allowed by the Munsif, which the judge also considers proper, was Rs. 15 for the *Griha Pravesam* and Rs. 140 for the *Ritusanti*, and we allow the plaintiff these sums or Rs. 155 in all.

It is not shown that the three other items claimed are legitimate expenses under the law. The fact that such expenses are usually incurred will not make them legally binding on the defendant. We must, therefore, disallow them in *toto*. It is objected that the plaintiff has not the right to sue, but as she is the person who was interested in making the payment which the defendant was bound to make, she was entitled to sue under S. 69 of the Indian Contract Act, as laid down in the former case.

We reverse the decree of the District Judge and in modification of the Munsif's decree award to the plaintiff Rs. 155 with costs on that amount throughout.

—
S. L. R.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson, Mr. Justice Bhashyam Aiyangar
and Mr. Justice Moore.

Ratnamasari Appellant *
(Plaintiff).

v.

Akilandammal and others Respondents
(Defendants).

Limitation Act, Sch. II, Arts. 118, 119 and 141—Specific Relief Act, S. 42—Hindu Law Ratnamasari
—Suit to set aside or establish an adoption—Suit for bare declaration—Suit for v.
recovery of possession. Akilandam-
mal.

Held, by the Full Bench (Bhashyam Aiyangar, J. dissenting) that where a plaintiff cannot obtain a decree without getting a decision that an adoption is invalid or never in fact took place, or that an adoption is valid his claim will be governed by Articles 118 and 119, Sch. II, of Act XV of 77 though he may also seek for the recovery of possession of immoveable property.

Art. 141 of the same Act does not apply to a case where the plaintiff cannot succeed without impugning or establishing an adoption.

Per Bhashyam Aiyangar, J.:—Articles 118 and 119 apply only to declaratory suits sanctioned by S. 42 of the Specific Relief Act.

Appeal from the decree of the Subordinate Judge's Court of Bellary and Salem at Salem in O. S. No. 7 of 1897.

B. Shadagopachariar for appellant.

P. S. Sivaswamy Aiyar for respondent.

The Court delivered the following

JUDGMENTS :—MOORE, J. :—The plaintiff's suit has been dismissed as being barred by limitation under Art. 119 of the second schedule attached to the Limitation Act. There is practically no dispute as to the facts of the case. The adoption is alleged to have taken place in 1886. The rights of the plaintiff as adopted son were interfered with in 1889 and this suit was not brought till 1897. In the plaint the plaintiff prays for a declaration that he is the

* A. 52 of 1900.

3rd October 1902.

Ratnamasari v. Akilandam-mal.
Moore, J. adopted son of Arunachala Asari and also for the recovery of certain properties which he claims to be entitled to as such adopted son. It is clear that under Art. 119 this suit, in so far as the prayer for a declaration is concerned, is barred. It is, however, urged, that the plaintiff has 12 years within which to bring his suit for the recovery of the property.

The decisions of the several High Courts in India on the important question thus raised are most conflicting, and it cannot be said that the matter has been conclusively decided by the Privy Council. The decisions of their Lordships bearing on this point which have to be considered are *Jagadamba Chowdhurani v. Dakhina Mohun*¹, *Mohesh Narain Moonshi v. Taruck Nath Moitra*² and *Luchmun Lal Chowdhry v. Kanhya Lal Mowar*³. The case dealt with in the 13th vol. of the I. A. was one which came under Article 129 of Act IX of 1871 which was as follows:—

Description of suit.	Period of limitation.	Time from which period begins to run.
129. To establish or set aside an adoption.	12 years ...	The date of the adoption or (at the option of the plaintiff) the date of the death of the adoptive father.

As to the wording of this Article their Lordships observe that the expression "suit to set aside an adoption" is not quite precise as applied to any suit. "An adoption may be established but can hardly be set aside though an alleged or pretended adoption may be declared to be no adoption at all." It is further pointed out that the expression "set aside an adoption" has been for years applied to "proceedings which bring the validity of an alleged adoption under question and applied quite indiscriminately to suits for possession of land and to suits of a declaratory nature." Reference is

1. L. R., 13 I. A. 84; I. L. R., 13 C. 308. 2. L. R., 20 I. A. 30; 20 C. 487.

3. L. R., 22 I. A. 51; 22 C. 609.

then made to the alteration introduced in the Limitation Act of 1877 where the two following Articles take the place of Article 129 in the Act of 1871 :—

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Moore, J.

118. To obtain a declaration that an alleged adoption is invalid or never in fact took place.	6 years.	When the alleged adoption becomes known to the plaintiff.
119. To obtain a declaration that an adoption is valid.	6 years.	When the rights of the adopted son as such are interfered with.

Alluding to these new Articles their Lordships observe that whether the alteration of the language denoted a change of policy or how much change of law it effected were questions not then before them, adding however that they might “fairly infer that the Legislature considered the expression ‘suit to set aside an adoption’ to be one of a loose kind and that more precision was desirable”. Their Lordships proceed as follows :—“ If then the expression is not such as to denote solely, or even to denote accurately, a suit confined to a declaration that an alleged adoption is invalid in law or never took place in fact, is there anything in the scope or structure of the Act to prevent us from giving to it the ordinary sense in which it is used, though it may be loosely, by professional men ? The plaintiff’s counsel were asked, but were not able, to suggest any principle on which suits involving the issue of adoption or no adoption must, if of a merely declaratory nature, be brought within six years from the adoption, while yet the very same issue is left open for twelve years after the death of the adopting widow it may be fifty years more, if only it is mixed up with a suit for the possession of the same property. It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession.”

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Moore, J.

The next decision to be considered is that of *Mohesh Narain Moonehi v. Turuck Nath Moitra*¹. In that case the plaintiff who had been in possession of one half of an immoveable estate as the adopted son of one Shib Narain sued for the recovery of the possession of the remainder of that estate. The defendant who was in possession of the property sued for, maintained that he was entitled to it as the adopted son of Shib Narain. Their Lordships observed :—"The present is not a suit in which the plaintiff expressly asks for a decree to 'set aside' the defendant's adoption or to obtain a declaration that the 'adoption was in valid', which would probably be a more apt expression to use. The plaintiff merely asks for a declaration of his right, and that possession may be given to him of the properties in dispute. But this, in the circumstances, obviously involves the setting aside of the defendant's adoption, or in effect a judgment or finding by the Court that the adoption is invalid, for the defence of possession founded on the adoption directly involves the decision of the question—was the adoption invalid?" Their Lordships therefore following the decision in *Jagadamba Chowdhrani v. Dakhina Mohun*² held that the plaintiff's suit was barred by limitation. Towards the conclusion of their judgment their Lordships, in refusing to adopt a suggestion that had been made before them that the question of limitation should be decided by them with reference to the provisions of the Act of 1877 and not of 1871, remark that it seemed to them to be more than doubtful whether, if the case then before them was to be decided as if the words of the Act applicable to the case were "to obtain a declaration that an alleged adoption is invalid or never in fact took place" in lieu of the phrase "to set aside an adoption", the plaintiff would thereby take any advantage. The last decision of the Privy Council that has to be considered is that of *Luchmun Lal Chowdhary v. Kanhya Lal Mowar*³. The case there dealt with is the only case in which the effect of Art. 118 of the Act of 1877, in a suit for possession, can be deemed to have come up for decision before the Privy Council. The case was argued before their Lordships with reference to Art. 118 which was assumed to govern the case. In their Judgment it was pointed out by their Lordships that if the adoption there under consideration was

1. L. R., 20 I. A. 30; 20 C. 487.

2. L. R., 13 I. A. 84; 13C, 308.

3. L. R., 22 I. A. 51; 22 C. 609.

one made by the widow of a son to herself and not to her husband which the High Court had held was the right construction of the deed of adoption produced, the plea of limitation could have no application to the suit which was one brought for the recovery of the husband's estate. Their Lordships, however, went on to observe that the suit was not barred by limitation on the ground that it had not been shown that the alleged adoption became known to the plaintiff (respondent) within six years of the institution of the suit. Here it is clear that their Lordships dealing with a suit by a reversioner seeking possession of an estate on the death of a widow and being met by the plea of the defendant in possession that he had been adopted by the widow as a son to her husband, held that such a case would be governed by the provisions of Article 118 in the second schedule attached to the Act of 1877. As to the view that should be taken of the effect of this judgment I agree with the opinion of *Jenkins*, C. J. (at p. 278) and *Candy*, J. (at pp. 279—281) of the judgment in *Shrinivas v. Hanmant*¹. Reading these three decisions of the Privy Council carefully, it appears to me to admit of no reasonable doubt that the view that their Lordships take is that, where the plaintiff cannot obtain a decree without getting a decision that an adoption is invalid or never in fact took place, or, on the other hand, a decision that an adoption is valid, the question as to whether his claim is barred by limitation must be decided with reference to the provisions of Arts. 118 and 119 of the Act of 1877 just as in the case of similar cases brought before that Act was passed, the question of limitation had to be dealt with under the provisions of Art. 129 of the Act of 1871. Art. 141 of the Act of 1877 can be applied only in cases where the plaintiff can succeed without impugning the validity of an adoption or obtaining a decision that an adoption is valid. There is, in fact, as it appears to me, no distinction that can possibly be drawn between a suit to set aside an adoption and a suit to get a declaration that an adoption is invalid except that the former is a loose and inaccurate expression, while the latter is the correct phrase to use. If their Lordships of the Privy Council had drawn a distinction between the two classes of cases, we should, of course, be bound to accept this view taken by them, but they have, on the other hand, as it appears to me, in

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—
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1. I. L. R., 24 B. 260.

Ratnamasari v. Akilandam-mal. Moore, J. the judgments that I have referred to, shown clearly that they are not prepared to make any distinction. I am bound to follow and accept the clearly expressed opinion of their Lordships, notwithstanding that no one of their judgments can be considered, as I have already observed, to amount to an absolutely conclusive decision on the matter at issue in the present case. The question, in short, is, in my opinion, decided by authority. I assent to the view taken as to this matter by our own Court (*Parvathi Ammal v. Saminatha Gurukul*¹) and Bombay (*Shrinivas v. Hanmant*²) and dissent from the decision arrived at by Calcutta (*Jagannath Prasad Gupta v. Runjit Singh*³) and Allahabad (*Lali v. Murli Dhar*⁴). This appeal should, in my opinion, be dismissed with costs.

BHASHYAM AIYANGAR, J. :—The facts admitted or found are that one Arunachala Asari, who was the owner of the bungalow for the recovery of which this suit is brought, died in June 1885, leaving him surviving a widow, whom, shortly before his death, he authorized by word of mouth to adopt as his son the plaintiff, his daughters' son, and that in May 1886 the plaintiff was duly adopted by the widow of Arunachala Asari. On the death of Arunachala Asari, his nephew Ariyaputra, claiming as his undivided nephew, applied for a certificate for the collection of debts due to Arunachala and, on his death in March 1886, two of his widows, the 1st defendant and one Chinna Angammal, now deceased, continued the proceedings and obtained a certificate for the collection of the debts. And on the strength of such certificate the 1st defendant has been collecting the rent due by the tenant in occupation of the bungalow from 1889 and appears to have taken actual possession of the bungalow from the tenant in 1896. The present suit was instituted on the 4th May 1897 for recovery of possession of the bungalow and was dismissed by the Subordinate Judge as barred by the law of limitation under Article 119 of Schedule II to Act XV of 1877. And the question for consideration in this appeal is whether Article 119 of Schedule II to the Limitation Act is applicable to the case.

It appears from paragraph 10 of the judgment of the Subordinate Judge that the plaintiff was a minor in 1889 when the 1st

1. I. L. R., 20 M. 40.

2. I. L. R., 24 B. 280.

3. I. L. R., 25 C. 354.

4. I. L. R., 24 A. 195.

defendant began to collect the rent and thus reduced the bungalow into her possession. I presume that the suit was not instituted within three years after the plaintiff attained the age of majority. For, if it was instituted within three years after attaining majority, the suit can in no view be barred by the law of limitation. In paragraph 4 of the plaint it is stated that the plaintiff's status as adopted son was finally adjudicated on in Civil Suit No. 416 of 1895 on the file of the District Munsif of Namakal 'though the 1st defendant contested it'; the judgment in the said suit does not appear to have been filed in the case and no argument has been founded upon it on behalf of the plaintiff in connection with the question of limitation either before us or in the Court below. I mention this for the reason that, if the statement made in paragraph 4 of the plaint be well founded, it may be that Art. 119 would be inapplicable to the suit, even if it were otherwise applicable, for, in that case, it would be unnecessary for the plaintiff to establish again in this suit his status as adopted son of Arunachala Asari, if he had already obtained in a previous suit a decree declaratory of such title (*Chagan Lal v. Bapu Bhai*¹). The Subordinate Judge relying principally on the decision of this Court in *Parvathi Ammal v. Siminatha Gurukul*², held that as the rights of the plaintiff as adopted son were interfered with by the 1st defendant in 1899, more than six years before date of suit, the plaintiff's suit was barred under Article 119 of the Limitation Act, notwithstanding that the plaintiff does not seek in this suit for a bare declaration of his right as an adopted son under S. 42 of the Specific Relief Act, but for recovery of possession of property to which he is entitled by virtue of his adoption. I am unable to concur in this view. And in my opinion Art. 119 is applicable only to a suit of the character defined by S. 42 of the Specific Relief Act for a declaration that the plaintiff is entitled to a status or legal character as adopted son. In the present case the plaintiff being out of, and the defendant in, possession ever since 1889, the plaintiff could not maintain a suit for a mere declaration of a title and the only suit he could maintain is the present and the Article of the Limitation Act governing the suit is, in my opinion, Art. 144.

The decision of this Court in *Parvathi Ammal v. Saminatha Gurukul*³ relates to Article 118 of the Limitation Act, and not to

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1 I. L. R., 5 B. 68 at 71.

2 I. L. R., 20 M. 40.

3 I. L. R., 20 M. 40.

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Art. 119, though one of the learned Judges who took part in that decision expressed an opinion that a suit like the present would be governed by Art. 119. The only decisions in which the application of Art. 119 to a suit brought by a person claiming by virtue of his adoption to recover possession of immoveable property had to be considered are those reported in *Jagannath Prasad Gupta v. Runjit Singh*¹ and *Lali v. Murli Dhar*². And in both these cases it was held that Article 119 was applicable only to a mere declaratory suit when such a suit could be brought under section 42 of the Specific Relief Act. The reasoning on which the above two decisions proceed, in which I fully concur, will be equally applicable to Article 118, and in both of them the decision of this Court in *Parvathi Ammal v. Saminatha Gurukul*³ was dissented from. Though the present case may be distinguished from *Parvathi Ammal v. Saminatha Gurukul*⁴ on the ground that that decision turned on Article 118, yet I confess that the reasoning on which it proceeds would be equally applicable to Article 119. In the view which I take both the Arts. (118 and 119) refer only to mere declaratory suits which are sanctioned by Section 42 of the Specific Relief Act. Art. 118 provides a period of limitation for a suit which forms illustration (f) to Section 42 of the Specific Relief Act and Art. 119 provides the same period of limitation for a suit which is the converse of illustration (f) corresponding to illustration (h) to Section 42 of the Specific Relief Act.

If the question to be decided in this case were governed by a ruling of the Privy Council, we should of course be bound to implicitly follow it. The only decision of the Privy Council which can be regarded as a ruling is the case of *Jagadamba Chowdhurani v. Dakhina Mohun Roy*⁴ in which it was held that a suit to recover possession of immoveable property from a person who was in possession claiming title as an adopted son is in the ordinary language of Indian lawyers a suit to "set aside adoption" within the meaning of Article 129 of the Limitation Act IX of 1871, and that such a suit was therefore barred by the law of limitation, the same having

1. I. L. R., 25 C. 354.

3. I. L. R., 20 M. 40.

2. I. L. R., 25 C. 354.

4. L. R., 13 I. A. 84; 13 C. 308.

been instituted more than 12 years after the date of the adoption, notwithstanding that the suit was brought within 12 years after the death of the widow who made the adoption, on whose death the succession opened in favour of her husband's heirs, who were the plaintiffs in the case. This ruling is of course decisive in regard to a question of adoption which is governed by Act IX of 1871, though the suit in which such question arises may have been instituted after the coming into operation of Act XV of 1877 (*vide* Section 2, Act XV of 1877); but, in my opinion, that ruling is not applicable to cases governed by Art. 118 or 119 of the new Limitation Act, corresponding to Art. 129 of the old Limitation Act IX of 1871. Art. 118 and 119 of Act XV of 1877 are radically different from Art. 129 of Act IX of 1871 in every respect, *viz.*, (1) the phraseology in column 1 descriptive of the suit, (2) the period of limitation prescribed in column 2 and (3), the starting point for the period of limitation. Art. 129 of Act IX of 1871 was applicable as well to a suit to "establish" an adoption as to a suit to "set aside" an adoption, and the ruling of the Privy Council above referred to expounded only the meaning of the phrase 'to set aside an adoption' and the case was one in which the suit was brought against the adopted son and not one by an adopted son to establish his adoption. The said Art. No. 129, was split into two Articles in Act XV of 1877, *viz.*, 118 "to obtain a declaration that an adoption is invalid &c. &c."; 119 "to obtain a declaration that an adoption is valid." The High Court of Calcutta in *Jagannath Prasad Gupta v. Runjit Singh*¹ already referred to held that Art. 119 was applicable to a mere declaratory suit, both on the ground that the decision of the Privy Council in *Jagadamba Chowdhurani v. Dakhina Mohun Boy*² was inapplicable to cases governed by Act XV of 1877 and also on the ground that the said ruling did not warrant the conclusion that the expression 'suit to establish an adoption' which was a part of Article 129 (which part corresponds to Art. 119 of Act XV of 1877) included also a suit for the possession of immoveable property upon a title by adoption. It is true that there has been no decision of the Privy Council, or, so far as I am aware, of any High Court in India, in which it was decided that a suit brought by an adopted son to recover possession of immoveable property must be regarded

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1. I. L. R., 25 C. 354.

2. L. R., 13 L. A. 84; 13 O. 308.

Ratnamasari as a suit to establish the plaintiff's adoption within the meaning
v. of Art. 129 of Act IX of 1871 and that, as such, it was
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mal. Act. But in my opinion the expression 'establish' is in the ordinary language of Indian lawyers, the correlative of the expression 'set aside' and applies, like its correlative, as I shall show hereafter by reference to various Articles of the Limitation Act 'quite indiscriminately to suits for possession of land and to suits of a declaratory nature.' If the ruling of the Privy Council in *Jagudamba Chowdhrani v. Dakhina Mohun Roy*¹ is a binding authority as to cases falling under Art. 118 of Act XV of 1877, it will, in my opinion, be equally applicable to a suit like the present governed by Art. 119; but after bestowing my best consideration on the point I am satisfied that the question for determination in this appeal is not concluded by any ruling of the Privy Council and I am equally satisfied that there is no considered dictum of that tribunal bearing on the question. The earliest Privy Council case is that of *Jagadamba Chowdhrani v. Dakhina Mohun Roy*² and the latest Privy Council case in which the ruling in the above case was expounded in considering a cognate question governed by Art. 12 (a) of the Limitation Act, viz., to set aside a sale in execution of a decree of a Civil Court, is *Malkarjun v. Narhari*³. A reference to the judgment in the former case clearly shows that the application of Article 129 turned entirely upon the peculiar meaning in which the expression 'set aside an adoption' is used in the ordinary language of Indian lawyers and in several reported cases therein cited, however inaccurate such expression may be from a judicial point of view, as was pointed out by Lord Blackburn in the course of the argument when he addressed the appellant's Counsel as follows:—'How do you make them out to be suits to set aside adoptions? They seek to recover possession and may admit the adoptions while denying their efficacy to pass title.' After adverting to those cases their Lordships of the Privy Council expressed their conclusion as follows at page 94:—"It thus appears that the expression 'set aside an adoption' is and has been for many years applied in the ordinary language of Indian lawyers to proceedings which bring the validity

1. L. R., 13 I. A. 84; 13 C. 308

2. L. R., 13 I. A. 84; 13 C. 308.

3. I. L. R., 25 B. 337 at 350.

of an alleged adoption under question, and applied quite indiscriminately to suits for possession of land and to suits of a declaratory nature. It is worth observing that in the Limitation Act of 1877, which superseded the Act now under discussion, the language is changed. Art. 118 of the Act of 1877, which corresponds to Art. 129 of the Act of 1871, so far as regards setting aside adoptions, speaks of a suit 'to obtain a declaration that an alleged adoption is invalid or never in fact took place,' and assigns a different starting point to the time that is to run against it. Whether the alteration of language denotes a change of policy, or how much change of law it effects, are questions not now before their Lordships. Nor do they think that any guidance in the construction of the earlier Act is to be gained from the later one, except that we may fairly infer that the Legislature considered the expression 'suit to set aside an adoption,' to be one of a loose kind, and that more precision was desirable."

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"If then the expression is not such as to denote solely, or even to denote accurately, a suit confined to a declaration that an alleged adoption is invalid in law or never took place in fact, is there anything in the scope or structure of the Act to prevent us from giving to it the ordinary sense in which it is used, though it may be loosely, by professional men? The plaintiff's counsel were asked, but were not able, to suggest any principle on which suits involving the issue of adoption or no adoption must, if of a merely declaratory nature, be brought within twelve years from the adoption, while yet the very same issue is left open for twelve years after the death of the adopting widow, it may be fifty years more, if only it is mixed up with a suit for possession of the same property. It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose *language admits of it*, is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession."

From the above extract it is abundantly clear that their Lordships of the Privy Council guarded themselves at every step

Ratnasasari v. Attilandam. mel. Bhashyam Aiyangar, J. against expressing any opinion as to the effect of the change introduced in the Indian Limitation Act of 1877, and they observe that the later act cannot be any guidance in the construction of the earlier Act, and their observations as to the principle on which Art. 129 is founded 'of allowing only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute' are expressly based upon the expression 'suit to set aside adoption' which they say 'is not such as to denote solely or even to denote accurately a suit confined to a declaration that an alleged adoption is invalid in law or never took place in fact' and they observe that there is nothing in the scope of structure of the Act to prevent them from giving to the expression the ordinary sense in which it is used, though it may be loosely, by professional men. *Lord Hobhouse* who delivered the judgment of the Committee in the above case, expounded the same as follows in the case of *Mallikarjun v. Narhari*¹ : "In the case of *Jagadamba Chowdhurani v. Dakhina Mohun Roy*² the plaintiffs were reversionary heirs of a deceased Hindu subject to the interest of his widows. They brought suits not long after the surviving widow's death to recover the estate. But adoptions had been made in 1853 and 1856, either of which, if valid, would displace the plaintiffs. The law of limitation applicable to the case (the Act of 1871) provided that a suit to set aside an adoption must be brought within twelve years after the date of adoption. The plaintiffs sued, not to set aside the adoptions, but to recover the estate ; and they argued that their title was good until an adoption was set up ; that those who set it up must prove its validity, which accordingly might be controverted by the plaintiffs. There was difficulty in the case because the expression 'set aside an adoption' is inaccurate ; an adoption cannot be set aside, though its validity may be impeached ; and in fact the language was altered in 1877 before the appeal was heard. This Board found, however, that the expression had been frequently used in legal documents and was known to Indian lawyers as a short way of denoting any process in which the fact or the validity of an adoption was disputed. On *that ground* they held that the Legislature must have intended to place the specified limit on suits for these purposes. Then the suit being rightly described as one *to set aside an adoption*, attracted

1. I. L. R., 25 B. 337.

2. L. R., 13 I. A. 84 : 13 C. 306.

the consequence that the time for suing ran from the date of the adoptions, and that the suits of 1873 and 1874 were barred." It will be noted that *Lord Hobhouse* specially refers to the ruling in the case reported in 13 Indian Appeals as one under the *Act of 1871* and he explains that the *ratio decidendi* of the decision in that case was that the Judicial Committee found that the expression '*set aside an adoption*' "had been frequently used in legal documents and was known to Indian lawyers as a short way of denoting any process in which the fact or validity of an adoption was disputed" and that "on that ground they held that the Legislature must have intended to place the specified limit on suits for these purposes" and he concludes by saying "then the suit being rightly described as one to *set aside an adoption* attracted the consequence that the time for suing ran from the date of the adoption and that the suits of 1873 and 1874 were barred." (The italics are mine). It seems to me perfectly clear from the above explanation of the ruling in the case of *Jagadamba Chowdhurani v. Dakhina Mohun Roy*¹ that that ruling is the result of the suit being described in Art. 129 as one to *set aside an adoption* and of the technical meaning which that expression has in Indian legal phraseology and that it cannot apply to the corresponding Articles 118 and 119 in the Act of 1877, in both of which Articles the expression '*set aside*' and '*establish*' were eliminated and the suits described as declaratory suits. The decision of the Privy Council in *Malkarjun v. Narhari*² was given in the latter part of 1900 and it was subsequent to the decision of this Court in *Parvathi Ammal v. Saminatha Gurukkal*³ and also to the Full Bench decision of the Bombay High Court in *Shrinivas v. Hanmant*⁴ which followed the decision of this Court in *Parvathi Ammal v. Saminatha Gurukkal*.⁵ In both these cases reliance is placed upon the Privy Council cases of *Mohesh Narain Munshi v. Taruck Nath Moitra*⁶ and *Lachman Lal Chowdhri v. Kanhaya Lal Mowar*⁶ which were intermediate between *Jagadamba Chowdhurani v. Dakhina Mohun Roy*¹ and *Malkarjun v. Narhari*².

In *Mohesh v. Taruck*⁶ it was held that though the suit was brought in 1885, yet according to Section 2 of that Act and the

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1. L. R., 13 I. A. 84; 13 C. 308.

2. I. L. R., 25 B. 337.

3. I. L. R., 20 M. 40.

4. I. L. R., 24 B. 260.

5. I. L. R., 20 C. 487.

6. I. L. R., 22 C. 609.

Ratnamasari ruling of the Privy Council in *Appasami Odayar v. Subramania*
v. *Odayar*¹ the question of the validity of the defendant's adoption
Akilandam- therein was governed by Art. 129 of Act IX of 1871, inasmuch as the
mal. period of 12 years after the defendant's adoption expired in 1863,
 long before the Act XV of 1877 came into operation. Following,
 therefore, the ruling in *Jagadamba Chowdhrani v. Dakhina Mohun*
*Roy*² it was held that the suit was one to set aside an adoption
 within the meaning of Art. 129 of Act IX of 1871 and that the
 suit was therefore barred by limitation. *Lord Shand*, in delivering
 the judgment of the Committee in that case, after alluding to the
 suggestion made on behalf of the appellant that the Act of 1871
 having been superseded by the Act of 1877, the question of limi-
 tation should be determined with reference to the provisions of the
 later statute, which argument was eventually overruled, observed
 as follows :—"It seems to be more than doubtful whether if these
 ('to obtain a declaration that an alleged adoption is invalid or
 never in fact took place') were the words of the statute applicable
 to the case the plaintiff would thereby take any advantage." Both
 in *Jagannath Prasad Gupta v. Runjit Singh*³ and in *Ramchandra*
*Mukerji v. Runjit Singh*⁴ the meaning of the above passage in the
 judgment of the Privy Council was considered and explained as
 follows :—"What their Lordships considered to be more than doubt-
 ful, even if the language of the old law (Art. 129 of Act IX of 1871)
 were the same as that of the present law (Art. 118 of Act XV of
 1877), was not whether that would make any change in the law, but
 whether the plaintiff would take any advantage, that is, whether the
 plaintiff in the case before their Lordships would succeed under the
 circumstances of the case. That this is the meaning of the above
 passage appears to us to be clear not only from the language used,
 but also from the fact that the High Court held that the suit was
 barred by adverse possession and their Lordships in an earlier part
 of the judgment say that they decide the question upon the construc-
 tion of Art. 129 of Act IX of 1871, without expressing any dissent
 from the view of the High Court, that the suit was barred by
 adverse possession." It is possible that this may be the right
 interpretation, but I am by no means convinced of it and I prefer
 to construe it as it has been construed both by this Court and by

1. I. L. R., 12 M. 26.

2. I. L. R., 13 C. 308.

3. I. L. R., 25 C., 354 at 363.

4. I. L. R., 27 C. 242.

the Bombay High Court, *viz.*, that in the opinion of the Judicial Committee, whose judgment was delivered by *Lord Shand*, it was more than doubtful whether, if the language of Art. 129 of Act IX of 1871 had been the same as that of the Act of 1877, the result would have been different, that is, whether the plaintiff's suit would not have been barred by limitation. Assuming this to be the correct interpretation of the passage, what does this amount to? It amounts only to the expression of a doubt, and no more than a strong doubt, as to whether Art. 118 may not apply to a suit which is not merely one for declaration of the invalidity of the defendant's adoption. The expression of such doubt cannot be regarded as carrying the weight even of an *Obiter dictum* which must at least be the expression of an *opinion* "by the way."

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The next case [*Lachman Lal Chowdri v. Kanhaya Lal Mowar*¹] is one which was carried in appeal to the Privy Council and in which the counsel for the appellant (defendant who claimed by virtue of an adoption made by a widow) on the assumption that Art. 118 of Act XV of 1877 was applicable to the suit notwithstanding that it was not a mere declaratory suit, argued that the suit was barred by limitation under that Article and that the widow must be understood to have purported to adopt the defendant as son to her husband and not simply to herself as held by the High Court. Counsel for the respondent was not called upon and Lord Shand, in delivering the judgment of the Committee, held that, if the adoption of the defendant was really made by the widow as a son to herself and not to her husband, which the High Court has held to be the true construction of the deed of adoption produced, the plea of limitation could have no application in this suit which related entirely to the husband's estate. His Lordship then added that, in the opinion of their Lordships, there was another ground in respect of which also the defence clearly failed, *viz.*, that it has not been proved that the alleged adoption did become known to the respondent (plaintiff) till the death of the widow which occurred within 2 years of the institution of the suit. If the adoption was not to the husband, and the question involved in the suit was the right to inherit the husband's estate, neither Art. 129 of Act IX of 1871 nor Art. 118 of Act XV of 1877 would apply to

1. I. L. R., 22 C. 609.

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such a suit. That, therefore, was a complete answer to the argument urged by the appellant's Counsel and on the assumption on which he argued the case, viz., that Art. 118 was applicable to the case, and he could therefore rely on it in defence of the suit; their Lordships made another complete answer to his argument, viz., that it was not proved that the plaintiff had knowledge of the adoption more than 6 years before date of the institution of the suit. No question at all was raised or considered as to whether Art. 118 would apply to a case which was not merely one for declaration. And the Counsel for the respondent, in whose interest it would have been to raise the contention that Article 118 would govern only suits for a mere declaration, was not called upon, for the obvious reason that even on the assumption on which the appellant rested his case, viz., that Art. 118 was applicable to the case, the appeal failed on the two grounds already mentioned. I may also note here that it is distinctly stated in the judgment of the Privy Council at page 614 that the adoption was alleged to have been made by the widow two years after the death in 1846 of her husband. If this were so the law of limitation applicable to the alleged adoption even if it had been made to the husband, which it was not, would be Art. 129 of Act IX of 1871. Under all these circumstances it is impossible to regard the judgment of the Privy Council in this case as a decision that Art. 118 would be applicable even if the suit was not one for mere declaration but one for recovery of possession of immoveable property from one claiming to be in possession as adopted son and I venture to state that it cannot be regarded even as a dictum. The pronouncement of the Judicial Committee on a question of law which was argued and considered, though such pronouncement may not have been necessary to the decision of the case, is of course entitled to the highest weight, and so far as this Court is concerned will stand nearly on the same footing as an authoritative ruling. In *Parvathi Ammal v. Saminatha Gurukul* Shephard J. did not rely upon this judgment of the Privy Council either as a decision or dictum in support of his conclusion, for he refers to it as a later case in which "it appears to have been assumed that notwithstanding the change a plaintiff suing for possession must bring his suit within

6 years of his knowledge of the defendant's adoption." In the Bombay Full Bench case, however, *Jenkins*, C. J., strongly relies upon the decision of the Privy Council in this case and says that "the judgment does not profess to proceed on an assumption made merely for the purpose of the decision and I think it must be left for their Lordships alone to distinguish the case on the ground that has been suggested at the bar if it be necessary. It certainly does not appear to me to be paying due respect to their Lordships' considered judgment, for such it was, to say that they either overlooked a point which must have been brought to their notice or that without so expressing themselves they decided on an Article of the Limitation Act which had no application". With all deference I am compelled to express my dissent from this view. If the judgment of their Lordships in the case had been that the suit *was barred* under Art. 118, it would then certainly be a decision on the point; and it would not be paying due respect to their Lordships' judgment to say that they either overlooked a point which ought to have been, but was not, brought to their notice by the respondent's Counsel or that without so expressing themselves they decided that the suit was barred by an Art. of the Limitation Act which Article had no application to the case and that therefore it is not a binding authority. It is a matter of almost daily experience in courts of appeal that when the arguments of the appellant's Counsel fail even on the assumption on which he bases his arguments, the appeal is dismissed without the respondent's Counsel being called upon and without considering or deciding whether the assumption on which the appellant's Counsel has proceeded is well-founded in law or not. As pointed out already by me, the slender inferences which may be drawn in support of the decision of this Court in *Parvathi Ammal v. Saminatha Gurukul*¹ and of the Bombay High Court in *Shrinivas v. Hanmant*² from certain passages detached from their context in the three judgments of the Privy Council above referred to and a casual remark by way of illustration, made in the judgment of the Privy Council in *Sri Balasu Gurulingaswami v. Ramalakshamma*³ as to the six years' rule of limitation enacted by the Legislature in regard to adoption, are sufficiently repelled by the explanation given in the latest Privy Council decision in *Malkarjun*

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1. I. L. R., 20 M. 40.

2. I. L. R., 24 B. 260.

3. I. L. R., 22 M. 398 at 418.

Ratnamasari v. Narhari¹, of the ruling in the leading case of *Jagadamba Chowdhurani v. Dakhina Mohun Roy*². Both the Calcutta High Court and the Allahabad High Court have, after a consideration of the three decisions of the Privy Council above referred to, come to the conclusion that the ruling of the Privy Council in *Jagadamba Chowdhurani v. Dakhina Mohun Roy*² is applicable only to a case in which the question of adoption is governed by Article 129 of Act IX of 1871 and that neither that decision nor the decision in either of the two subsequent cases is an authority that Articles 118 and 119 govern a suit for the recovery of possession of immoveable property when the title to such possession involves the determination of the invalidity of an adoption relied upon by the defendant or the validity of an adoption relied upon by the plaintiff and they have dissented from the decision of this Court in *Parvathi Ammal v. Saminatha Gurukul*³ and the decision of the Bombay High Court in *Shrinivas v. Hanmant*⁴.

I shall now proceed to consider the question with reference to the provisions of the three Limitation Acts, viz., Act XIV of 1859, IX of 1871, and XV of 1877, and the provisions of the Specific Relief Act, 1877, which have a most important bearing upon the construction of Arts. 118 and 119 of Act XV of 1877. Under Act XIV of 1859 declaratory suits in respect of adoption were governed by Cl. 16 of Section I which prescribed a limitation of six years, to commence with the time when the cause of action arose, to all suits not specially provided for and it was held that the period of six years ran from the date of adoption [*Mrino Moyee Debia v. Bhoobun Moyee Debia*⁵]; and it was undoubted under that Act that suits for the recovery of immoveable property were governed by the 12 years' period of limitation prescribed by Clause 12 of Section I, notwithstanding that such suits involved the validity of an adoption relied upon by the plaintiff or the invalidity of an adoption relied upon by the defendant [*Sreenath Gangooley v. Mohesh Chunder Roy*⁶]. This Act was superseded by Act IX of 1871 which provided in Schedule II various periods of limitation ranging from 30 days to 60 years for different classes of suits described respectively in 150 Articles. The first column of the

1. I. L. R., 25 B. 337.

3. I. L. R., 20 M. 40.

5. 23 W. R. C. R., 42 at 44.

2. I. L. R., 13 C. 308.

4. I. L. R., 24 B. 260.

6. 4 B. L. R. F. B.

schedule describes the nature of the suit, the second column specifies the period of limitation and the third column the time when such period begins to run. The phrase "to set aside" was fully used in describing several classes of suits, for example, in Arts. 14, 15, 16, 92, 96, 125 and 129. The same expression "to set aside" is used in several Articles prescribing a period of limitation under the head of 'applications.' A reference to those Articles will clearly show that, in most of those cases at any rate, the suits would comprise not only suits for a mere declaration of the validity or the invalidity of certain sales, orders, decisions, acts or instruments, but also suits for the recovery of immoveable property in which the validity or otherwise of a sale, order, decision, act or instrument may be involved. There were also certain Articles in that very Act describing certain suits as suits to obtain a declaration (see for example Arts. 93 and 146). Article 118 prescribed a period of six years for suits not otherwise provided for. In certain Articles the suits therein referred to are described as suits to void or contest something, apparently in the same sense as the expression 'set aside.' The Article which had to be construed by the Privy Council in the leading case of *Jagadamba Chowdhrani v. Dukhina Mohun Roy*¹ was Article 129 and there was certainly no reason why the expression 'set aside' in that Article should be construed in a sense different from that in which it was used in most of the other Articles in the same schedule, a sense in which the expression has been for many years used in the ordinary language of Indian lawyers, as appeared from the various reported cases referred to by the Privy Council. Whether the provision made in Art. 129 in regard to suits involving the question of adoption was scientific or not, the prescribing of 12 years as the period of limitation leads strongly to the inference that it was the intention of the Legislature that Art. 129 should apply also to suits for the recovery of immoveable property, in which suits the question of adoption was involved. If Article 129 had been intended to govern suits for mere declaration in respect of adoption, it is extremely unlikely that the period of six years which was applicable thereto under the Act of 1859 would have been changed and assimilated to the period of twelve years, which both under the Act of 1859 and the Act of 1871 is the general

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1. I. L. R., 13 C. 308.

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period of limitation for suits for the recovery of immoveable property. When the Act of 1871 was superseded by the Act XV of 1877 the phrase 'set aside' was retained in all the Articles corresponding to the above Arts. in the Act of 1871, except in Art. 118 corresponding to Art. 129 of the Act of 1871. Article 44 was also added providing three years as the period of limitation for a suit by a ward who has attained majority "to set aside" a sale by his guardian, such period to be reckoned from the time of the ward's attaining majority. It was held by the Privy Council in *Malkarjun v. Narahari*¹, differing from the decision of the Bombay High Court in *Baghvant Govind v. Kondi*² that this Article in which the expression 'set aside' is used would apply to a suit for redemption for which the period of limitation is sixty years, when such suit was brought more than three years after the plaintiff had attained majority and the mortgagee resisted the claim for redemption by relying upon a sale of the equity of redemption made by the ward's mother and guardian during his minority. Shortly before Act XV of 1877 was passed on the 19th of July 1877, the Specific Relief Act had been passed into law on the 7th February 1877 and the law as to declaratory decrees was laid down by Section 42 of that Act with a number of illustrations appended thereto. The illustration (f) relating to adoption runs as follows:—

"A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may in a suit against the adopted son obtain a declaration that the adoption was invalid."

Article 129 of the Act of 1871 was split into two Articles 118 and 119 in the new Act and expressions 'establish' and 'set aside' were dropped, notwithstanding that such expressions were retained in other Articles and the period of limitation was cut down from 12 to 6 years and the starting point was also altered from the date of adoption to the date of plaintiff's knowledge of the alleged adoption or the date of interference with the rights of the adopted son. Article 118 embraced two classes of suits, viz., suits to obtain a declaration that an alleged adoption is invalid and suits to obtain a declaration that an alleged adoption never in fact took

1. I. L. R., 25 B. 837.

2. I. L. R., 14 B. 279.

place. Article 129 of the old Act could not apply to the latter class of suits, for the expression 'set aside' cannot apply to a case in which there was in fact no adoption at all and therefore there was nothing to set aside. Such suits therefore even under the Act of 1871 would have been governed by the six years rule prescribed for suits not otherwise provided for by Art. 118 corresponding to Art. 120 of the Act of 1877. Art. 119 of the Act of 1877 corresponds to the 1st part of Art 129 of the Act, 1871, i. e., a suit to establish an adoption. Unlike Art. 118, Art. 119 does not separately provide for a suit to obtain a declaration that an alleged adoption in fact took place, for the simple reason that the mere *factum* of adoption will not entitle one to a legal character unless the adoption is also valid. A plaintiff, therefore, will have to sue for a declaration that his adoption is valid whether the *factum* itself is denied or the *factum* is admitted but the validity is challenged. Taking into consideration that the expressions 'establish' and 'set aside' were dropped in Articles 118 and 119 and that the language descriptive of the two classes of suits is identical with the language of Section 42 of the Specific Relief Act and illustration (f) thereto and that the period of 12 years was reduced to six years which was the period generally applicable to suits for mere declaration under Act XIV of 1859 and was the period applied to suits for declaration in respect of adoption under that Act (*Mrino Moyee Debia v. Bhoobun Moyee Debia*¹) it is impossible to resist the conclusion that the Legislature deliberately departed from the policy of Art. 129 of the Act of 1871 and confined the operation of Art. 118 and 119 of the new Act to mere declaratory suits as defined in S. 42 of the Specific Relief Act. It is most unlikely that the change of policy was only to reduce to six years the period of 12 years provided by the Act of 1871 (Art. 129) and to fix a different starting point. In *Parvathi Ammal v. Saminatha Gurukkal*² Shephard, J. advertising to this point observes that "there was no need for the abbreviation of the period or indeed for the retention of any special article if it was intended only to apply to cases in which the plaintiffs seek for a mere declaration and nothing more." If Arts. 118 and 119 had not been enacted in the Act of 1877 the result would have been that the general Article 120 prescribing a

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1. 23 W. R. C. R. 42.

2. I. L. R., 20 M. 40.

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period of six years from the date of the cause of action would govern such suits and the period of six years would reckon from the date of adoption as was held to be the case under the Act of 1859 and not from the date of the plaintiff's knowledge of the alleged adoption or from the date of interference with plaintiff's rights as adopted son, as provided in the third column of Arts. 118 and 119. The retention of Articles 118 and 119 was therefore necessary in view of the provision made in the third column thereof as to the time from which the period of six years was to run. On the hypothesis that Art. 118 and 119 relate to mere declaratory suits and that a plaintiff wishing to avail himself of the extraordinary and equitable relief to be obtained in such suits should be vigilant, the curtailment of the period of limitation from twelve to six years becomes perfectly intelligible and the provision made in the third column that the period of six years is to be reckoned from the date of knowledge or interference strongly supports the conclusion that the suits to which the Arts. relate are declaratory suits of the character defined in Section 42 of the Specific Relief Act. This conclusion derives further support from the general scheme of the 2nd Schedule to the Limitation Act. I shall for example refer to Articles 92, 93, 128, 129 and 131 of the 2nd Schedule. After providing a period of limitation in Art. 91 for a suit to set aside an instrument not otherwise provided for—an Article which has given rise to numerous conflicting decisions as to the class of suits for the recovery of immoveable property to which it is applicable (*Janki Kunwar v. Ajit Singh*¹) Articles 92 and 93 prescribe a period of limitation of 3 years for a suit to obtain a *declaration* that a certain instrument issued, registered or attempted to be enforced against the plaintiff is a forgery. As in the case of Articles 118 and 119, the period of limitation is to be reckoned from the date of the plaintiff's knowledge or from the date of the attempt to enforce the instrument. Can it be contended that a suit brought for redemption or recovery of immoveable property or for the recovery of a debt within the period of limitation prescribed for such suits would be governed by Articles 92 and 93 and barred thereunder, if the defendant resists the suit by relying upon a forged instrument of conveyance or a receipt and proves that the plaintiff had

1. I. L. R., 15 C. 58 at 65.

knowledge of its issue or registration more than 3 years before the date of the suit? If the interpretation placed by this Court and by the High Court of Bombay on Articles 118 and 119 be sound, the above contention as to Articles 92 and 93 ought also to prevail.

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Art. 129 of Act XV of 1877 provides a period of 12 years to be reckoned from the time when the right is denied, to obtain a declaration of one's right to maintenance. If such suit were not a mere declaratory one how are we to account for Art. 128 which prescribes a period of 12 years for a suit for recovery of arrears of maintenance. Reading Arts. 128 and 129 together, it is obvious that though the right to maintenance may have been denied long before 12 years of the date of suit, the suit for recovery of arrears of maintenance for 12 years preceding the suit can be maintained. Art. 131, however, which provides a period of 12 years in respect of a periodically recurring right does not relate to a mere declaratory suit and the expression used in that Article is not "for a declaration", but "to establish,"—which latter expression also occurs in Art. 11 and, as already pointed out is used in the Limitation Act as the correlative of 'set aside' (*Raoji v. Bala¹ Ramnad Zemindar v. Dorasamy²*.) This seems to account for the absence of an Article providing a period of limitation, as in the case of arrears of maintenance (Art. 128), for recovery of arrears of amount due in respect of a periodically recurring right.

The compendious expressions 'set aside' and 'establish', which occur in several Articles of the 2nd schedule have, in no few instances, led to various conflicting rulings by the different High Court and it is to be sincerely hoped that when Act XV of 1877 is revised these expressions will be dropped and the suits to which they relate, in the various Articles, will be described with greater precision and completeness.

If Arts. 118 and 119 are to be construed as curtailing the periods of limitation prescribed by Articles 141, 142, 144, 147 and 148 for recovery of immoveable property or for foreclosure or redemption of a mortgage, in cases in which the title will depend on the validity of an adoption relied on by the plaintiff or the invalidity of an adoption relied on by the defendant, it will

1. I. L. R., 15 B. 135.

2. I. L. R., 7 M. 341 at 343.

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follow that, in the like cases, Arts. 118 and 119 will have the effect of enlarging the shorter periods of limitation prescribed by Arts. 10 (one year), 32 (two years), 48 and 49 (three years) of the 2nd schedule. Suits for a declaratory decree are excepted from the cognizance of Courts of Small Causes by Article 19 of the 2nd schedule of the Provincial Small Cause Courts Act of 1877. That Article has always been construed as referring to mere declaratory suits of the character defined in S. 42 of the Specific Relief Act and when a suit prays for a declaration of right accompanied by a consequential relief, which relief is within the cognizance of a Court of Small Causes, it has invariably been held, that the prayer for a declaration of right is merely ancillary to the consequential relief and therefore the suit is not excepted from the cognizance of the Court of Small Causes.

If Articles 118 and 119 are otherwise construed and made applicable to suits in which the relief or consequential relief claimed is recovery of immoveable property, such construction will be attended with numerous anomalies and great hardship. If a party remains and continue to remain in possession of immoveable property notwithstanding that, to his knowledge, an adoption is alleged, which if valid would disentitle him to the property, the only suit he could maintain would be a mere declaratory one under S. 42 of the Specific Relief Act; but it would be entirely in the discretion of the Court to entertain and decree such a suit. If, therefore, he does not bring such a suit or if such suit is brought, but dismissed in the exercise of the discretion of the Court, and if before he has been in possession for the statutory period, he should be dispossessed by the person claiming as adopted son or by some one claiming under him, a suit which he may have to bring in ejectment against either of such persons will be barred under Art. 118. A declaratory decree is not a matter of course and the Privy Council has in several suits relating to adoption refused to give a declaratory decree. So recently as 1890, in *Rani Pirthi Pal Kunwar v. Rani Guman Kunwar*¹ where the only object of a declaratory suit was to prevent a defendant who claimed property under an alleged adoption, from obtaining possession after the plaintiff's death, it was held

that the suit was properly dismissed. In that case, the plaintiff, the mother-in-law of the 1st defendant, prayed for a declaration that the adoption of the 2nd defendant by the 1st defendant was invalid and that a proposed transfer to him of certain property was ineffectual. The plaintiff, besides being in possession of some property for life as a provision for maintenance, was the reversionary heir entitled to succeed to the whole estate on the death of her daughter-in-law, the 1st defendant, if the 2nd defendant's adoption, which was made in 1883, two years before the suit, was invalid. *Sir Barnes Peacock*, in delivering the judgment of the committee, stated as follows, quoting from *Sree Narain Mitter v. Sree Mutty Kishen Soondary Dossee*¹ :—"It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not and in every case the Court must exercise a sound judgment as to whether it is reasonable or not, under the circumstances of the case, to grant the relief prayed for. There is so much more danger than here, of harassing and vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation" ***. "All that is suggested by the learned Counsel on the part of the appellant in support of a declaratory decree is this : that, at some time or other, after the death of the present plaintiff, the person who, according to the plaintiff's contention, is not an adopted son, may, by some means, either by an act of Government or otherwise, obtain possession as an adopted son. The only object therefore of having a declaratory decree is to prevent him being put into possession. Their Lordships cannot assume that the Government, if petitioned to put the person claiming to be an adopted son into possession, would do so unless they saw that he had a right to that possession. The officers of Government would, in ordinary course, if there were any doubt as to the title, refer the parties to the Civil Court. If the person claiming to have been adopted brings an action to enforce his title, the question will be investigated whether he was validly adopted or not."

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It is perfectly clear from the above extract that the declaratory decree would not have been refused, in the exercise of judicial

1. L. R., I. A. Supp. 149.

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mal. brought within six years of the date of the knowledge of the
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It is also settled law that a suit for declaration of the invalidity of a defendant's alleged adoption can be brought only by the presumptive reversionary heir, unless the presumptive reversionary heir is in collusion with the widow or has precluded himself from questioning the adoption [*Rani Anund Koer v. The Court of Wards*¹]. In *Tekait Doorga Persad Singh v. Tekaitni Doorga Konwaree*² their Lordships of the Judicial Committee, in the exercise of their discretion, declined to remand the case for adjudication as to whether the plaintiff was the presumptive reversionary heir, with a view to his obtaining the declaratory decree sought for, and in so doing, observed as follows (at page 163):—
 "Such an inquiry would be attended with considerable expense, and would cause great delay, and if the inquiry should result in a finding favourable to Joy Mungal, the decision might not be final in his favour, because the present plaintiff might die in the lifetime of the widow and the estate might never come to him. Further, there are others who might prove a preferable title to the plaintiff and to the defendant No. 1 and who would not be bound by any decision in this or in the former suit to which they are no parties. It appears, therefore, to their Lordships that they would not be exercising a sound discretion in sending the case for a further inquiry, which after causing considerable expense and delay would not be binding upon the whole family." Having regard to these decisions it will be most unreasonable to construe Arts. 118 and 119 as relating to suits other than suits for mere declaration of the invalidity or validity of an adoption as the case may be. If limitation begins to run in favour of an alleged adoption under Article 118, it will run not only against the presumptive reversionary heir, but also against the person who may be the actual reversionary heir at the date of the death of the widow, and if a suit of a declaratory character cannot be maintained during the widow's lifetime by a remoter reversionary heir in the absence of collusion between the widow

1. L. R. 8 I. A. 14 at 22.

2. L. R., 5 I. A. 140.

and the nearer reversionary heirs, the actual reversionary heir may find himself barred by limitation under Art. 118, when he sues to recover possession on the death of the widow. If we turn to Art. 119 the anomalies are not the less. In this very case, the plaintiff's rights as adopted son of Arunachala Asari were interfered with in 1889. Has limitation been running against him from 1889 only in respect of his claim to recover possession of his adoptive father's estate or also in respect of any claim which may hereafter accrue to him to recover possession of the properties of any agnate or cognate relation of Arunachala Asari to whom he would be entitled to inherit if he had been the born son of Arunachella Asari? In all the cases in which the question has hitherto been considered, it was assumed that the party seeking to invalidate the adoption would have to do so only in view to his succeeding to the estate of the deceased husband as his reversionary heir after the death of the widow—an estate which after all may be nominal or very inconsiderable. It was overlooked that the alleged adopted son (including his descendants) would, if his adoption were valid, become the heir or a possible heir to each of the numerous agnate or cognate relations of the alleged adoptive father, the estate possessed by some of whom might be very considerable. Can each of them bring, and if so, ought each to bring, a declaratory suit under Section 42 of the Specific Relief Act, within six years after knowledge of the alleged adoption? If no such suit has been brought, is it to be held that if he or any of his descendants manages to get into possession of all or of any of the properties of any such agnate or cognate relation on or after his death, the person who would be his heir, if the adoption never took place in fact or if it did take place was invalid, would be barred by Art. 118 from successfully maintaining a suit against the alleged adopted son or a descendant of his in possession of the property? Would a decree obtained by only one of such agnate or cognate relations of the alleged adoptive father, declaring the invalidity of the adoption, enure to the benefit of the other agnate or cognate relations, to each of whom the alleged adopted son would be in the line of heirs if the adoption were true and valid? The alleged adopted son himself may deny the factum of adoption or its validity, and claim a share in the property belonging to the family in

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which he was born—vide *Bireswar Mukerji v. Ardhachander Roy*¹, and if he brings a suit for partition of such property on the ground that he has been excluded therefrom, is the suit to be governed by the 12 years' period prescribed by Article 127 or the six years' period prescribed by Article 118? When the language of Arts. 118 and 119 is plain, especially when those Articles are read in the light thrown upon them by other Articles in the same schedule and by section 42 of the Specific Relief Act which was passed contemporaneously with the Limitation Act of 1877, I fail to discover any justification for adopting a construction which results in the anomalies already pointed out and numerous other anomalies and complications which can be mentioned. Even if grammatically Arts. 118 and 119 are susceptible of either of the two constructions, there can be little doubt as to which of the two constructions ought to prevail. In the Full Bench Bombay decision² *Jenkins C. J.* observes as follows (at page 274):— 'Thus I take it to be clear that a man can with requisite leave combine in one suit a claim to establish status as an adopted son where his rights as such had been interfered with and a claim to recover possession of property, his title to which depends on a devise and no one would I imagine in so obvious a case think of suggesting, that the suit so far as it sought a declaration that the adoption was valid did not fall within Article 119.' The leave of the Court referred to above is evidently the one contemplated by S. 44 Rule (a) (C. P. C.) The italics in the above extract are mine and I fully concur in the proposition of law therein laid down. It only illustrates that two causes of action may, with the leave of the Court, be combined in one suit though one of them is purely of a declaratory character and the other for recovery of possession of property to which his title is founded upon a different cause of action, viz., his right as devisee of a testator. The law of limitation applicable to the former is Art. 119, and the law of limitation applicable to the latter is Art. 144; but if the property claimed in the suit was one to which he would be entitled by reason of his status as an adopted son, then, in that case, the suit is founded only upon one cause of action and the suit is not one in which two causes of action are combined. The declaration of his status as an adopted son is then simply an ancillary one. The Article of the law of

1. I. L. R., 19 C. 452 at 460.

2. I. L. R., 24 B. 260.

limitation applicable to it will be only one Article, viz., Art. 141 or 142 or 144 as the case may be and the prayer for declaration of his status as adopted son is only ancillary to the proof of his title to the immoveable property which he seeks to recover from the defendant. The next instance mentioned by *Jenkins, C. J.*, at the same page is exactly the same in principle and stands on the same footing as the first illustration given by him. But can it be contended that a suit for the recovery of immoveable property is barred by limitation, because it was brought more than six years after the cause of action for declaration of title accrued? In such a suit if the plaintiff succeeds, the plaintiff's right is declared and delivery of the property decreed. Indeed, as a general rule, the plaint in such a suit contains an express prayer for declaration of title as ancillary to the consequential relief by delivery of property. As regards Art. 119, I am, with all respect, unable to concur in the reasoning of the learned Chief Justice which has led him to the conclusion that the suit contemplated by Article 119 cannot be a mere declaratory suit, but that it must almost necessarily be one including a claim for relief 'at least to an injunction.' The reasoning, as I understand it, is that inasmuch as the starting point from which the period of six years runs is the date when the rights of the adopted son as such are interfered with, therefore the suit is one in which the plaintiff is almost necessarily entitled to some consequential relief, by reason of the supposed interference and that, therefore, having reference to the proviso to S. 42 of the Specific Relief Act, the suit contemplated by Article 119 cannot be a mere declaratory one. If the interference was, as in this case, an interference by taking possession of the property to which the plaintiff was entitled as adopted son, the suit cannot be one for mere declaration under S. 42 of the Specific Relief Act, but must be in ejectment, as the present case is. In *Jaganath Prasad Gupta v. Runjit Singh*¹ and *Lali v. Marlidrar*² which are the only two cases in which the question as to the application of Art. 119 arose, the interference with the rights of the adopted son, which took place during the lifetime of the widow, was not such as to have entitled the plaintiff to any relief further than a mere declaration of his status as an adopted son. The interference may no doubt in some cases be such as to induce the Court to give relief

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1. I. L. R., 25 C. 355.

2. I. L. R., 24 A. 195.

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by way of injunction,—if such relief were applied for,—and not merely relief by way of declaration of title. Whether injunction will be given or not will rest entirely in the discretion of the Court, in the exercise of which discretion the Court will be guided by the principles and rules enacted in Chapter 10 of the Specific Relief Act. If a party claiming as adopted son brings a suit to obtain an injunction against the defendant, and not a mere declaration of his legal character as adopted son, the article of the Limitation Act applicable thereto will not be Art. 119, but the general Art. 120, though so far as the question of limitation goes it will make no difference in the majority of cases, whether the one article or the other is applied to the suit. I am not aware that a person who is actually in possession of property, but whose possession is interfered with—it may be casually or repeatedly—cannot content himself with a declaratory suit, but must sue for an injunction. If he is ousted then no doubt he must sue in ejectment as that is the necessary relief he is entitled to in law consequent upon the declaration of his legal character as adopted son. If the interference was by way of trespass which, however, was only casual, he may get a declaratory decree, but it is hardly likely that an injunction will ever be given. Even if the interference was by repeated trespass, I do not think it has ever been held that that circumstance is a bar to his contenting himself with a mere declaratory decree. The further relief referred to in the proviso to S. 43 of the Specific Relief Act cannot in my opinion apply to an equitable injunction which the Court may or may not, having regard to all the circumstances of the case, grant. However that may be, it does not affect the construction of Art. 119 as relating only to a declaratory suit. If the interference be such as would compel the adopted son—as in the present case—to seek further relief than a mere declaration he ought to shape his suit accordingly and the limitation Article 119 will not apply to such a suit. The Legislature in using the expression “interfered with” has chosen the mildest expression which would denote some overt act denying the adoption and in my opinion such expression was advisedly chosen as the suit contemplated by Article 119 is a mere declaratory suit. In my opinion the language of Articles 118 and 119 is unambiguous and denotes a declaratory decree of the character defined by S. 42 of the Specific Relief Act and it is

impossible to regard the decision of the Privy Council in the leading case of *Jagdamba Chowdhrami v. Dakhina Mohun Roy*¹ as applicable to cases governed by the new Limitation Act when in that very judgment their Lordships of the Privy Council expressly say that it is unnecessary to consider or express any opinion as to whether the alteration of language introduced in the Act of 1877 denotes a change of policy or how much change of law it effects. For the reasons above given I am unable to concur in the reasoning on which the decision of this Court in *Parvati Ammal v. Saminatha Gurukul*² proceeds, as to the application of Article 118 to a suit brought against an alleged adopted son and by logically extending that reasoning to Art. 119, to hold that the present suit, which is brought by an alleged adopted son, is barred by limitation. I would, therefore, allow the appeal and reversing the decree appealed against give a decree in favour of the plaintiff as prayed for, the findings on the issues relating to the merits of the case being all in favour of the appellant.

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Benson, J. :—If the question were *res integra* I should attach great weight to the arguments put forward by my learned brother, whose judgment has just been delivered, to show that Article 119 is applicable only to a suit where a declaration without further relief is sought ; but I do not consider myself free to disregard what appears to be the necessary consequence of the judgment of the Privy Council in the case of *Jagadamba Chowdhrami v. Dakhina Mohun Roy*¹ and of the reasoning by which that judgment is supported.

I therefore concur in the conclusion of my learned brother *Moore, J.*, and dismiss the appeal with costs. It is much to be desired that where, as in this case, there is a direct conflict between the rulings of the several High Courts on matters of great and general importance, the Legislature should take an early opportunity of so amending the law as to remove doubts as to its true meaning.

1. I. L. R., 13 O. 308.

2. I. L. R., 20 M. 40.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Chief Justice*,
Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Kaveri Ammall and 3 others ... Appellants*
(Defendants.)

v.

Ramier and another ... Respondents
(Plaintiffs 2 and 3.)

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*Hindu Law—Adoption—Widow not joining—Step-mother—Heir entitled to possession
suing as reversioner—Decree declaring plaintiff as reversioner—Res judicata—
Mistake of law—Civil Procedure Code S. 13—Specific Relief Act S. 42.*

A suit by a plaintiff on the ground that the defendant being only a step-mother was not the heir and that the plaintiff or his ancestor was the heir entitled to possession is not barred under S. 43, C. P. C., by the fact that the plaintiff or his ancestor brought a suit against the defendant on the footing that she held a widow's estate and that he as next reversioner was entitled to set aside alienations made by the widow for no legal necessity.

A decree in such former suit declaring that the plaintiff's ancestor was next reversioner and was entitled to succeed to certain properties after the lifetime of the widow (*i. e.*, the limited owner) operates as *res judicata* and debars the plaintiff from recovering in a subsequent suit the same properties during the lifetime of the widow on the ground that his ancestor was the heir entitled to possession in preference to the widow in the absence of fraud or collusion.

The principle of *res judicata* applies notwithstanding the fact that a declaration of the nature mentioned in the former decree ought not to have been passed in the former suit, notwithstanding that the former suit should have been dismissed under the proviso to S. 42 of the Specific Relief Act on the ground that the plaintiff as being real heir entitled to possession failed to ask for possession, and notwithstanding that the former suit and decree may have been the result of a mistake of law.

Appeal under S. 15 of the Letters Patent presented against the judgment of Mr. Justice Moore, dated 24th September 1901, in A. A. O. No. 72 of 1900, preferred against the order of remand in A. S. No. 112 of 1899 on the file of the Subordinate Court of Coimbatore (O. S. No. 1455 of 1897 on the file of the Court of the District Munsif of Erode).

The last male owner of the plaint properties was the cousin of the plaintiffs. The 1st defendant was the adoptive step-mother of the last owner, she not having joined her husband in the adoption. On the last male owner's death, she took possession of his properties ostensibly as his heir and made certain alienations. The plaintiff's

father in whom the right of inheritance had really vested brought a suit in 1890 to have it declared that he was next reversioner to the estate, and that certain alienations made by the 1st defendant would not affect the reversion. The suit was dismissed so far as the alienations were concerned but the decree declared that the other properties should go to him after her death. After the decision in the *Uthumalai case* that the wives of the adoptive father who did not take part in the adoption were in the position of step-mothers to the adopted son, the plaintiffs brought this suit to recover immediate possession of the properties alleging the facts as in the previous plaint, and stating that their father who was immediate heir and as such entitled to possession of properties sued as reversioner by a mistake of law and that they were entitled to recover the properties as his heirs. The question was whether the suit was barred.

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T. V. Seshagiri Aiyar for appellant.

P. S. Sivaswamy Aiyar for respondents.

The Court delivered the following

JUDGMENT :—One Subba Dikshitar, father of the plaintiffs, and another Yagna Ramien, the husband of one Krishnammal and of the 1st defendant, were divided brothers. Yagna Ramien, in conjunction with his wife Krishnammal and to the exclusion of the 1st defendant, his junior wife, adopted, on the 27th October 1879, his brother's son, one Venkatramanien, a brother of the plaintiffs, and on the same day made a settlement of some of his properties upon the 1st defendant for life with remainder to one Kuppammal, his daughter by the 1st defendant. Yagna Ramien died in 1885 and shortly afterwards Krishnammal died and after her the adopted son Venkatramanien died unmarried in 1886. Plaintiff's father brought O. S. No. 512 of 1890 against the 1st defendant herein, her daughter Kuppammal, and the present 2nd defendant, to obtain a declaration that he was entitled to succeed to the properties left by Yagna Ramien—including the properties comprised in the deed of settlement made by him in favour of the 1st defendant and her daughter—as the reversionary heir of the deceased Venkataramanien, his brother's adopted son, after the lifetime of the 1st defendant and that the hypothecation deed, dated 15th October 1890, executed by the 1st defendant in favour of the

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3rd defendant in that suit, charging a portion of the property comprised in the deed of settlement cannot affect his reversionary right and bind him after the 1st defendant's lifetime.

It will be seen that the cause of action on which the said suit was based was that the 1st defendant succeeded to the estate of Venkatramanien, as his mother by adoption, having the limited estate of a widow under the Hindu law, that the plaintiff in the said suit was the contingent reversionary heir entitled to succeed to his properties on the death of his limited heir, the 1st defendant, and that the settlement made by Yagna Ramien in favour of the 1st defendant and her daughter was not binding on his adopted son, the deceased Venkataramanien. The defendants in that suit did not deny the right of Subba Dikshitar, the plaintiff therein, as the reversionary heir of the adopted son entitled to succeed to his properties, after the death of the 1st defendant, but contended that the deed of the settlement, subject to which the adoption was made was binding upon the adopted son and that therefore his suit was not maintainable in respect of the properties comprised in that settlement, viz :—items 1, 2, 3, 7 and 8 and a moiety of items 9 and 10 in the schedule annexed to the plaint therein. The deed of hypothecation under which the 3rd defendant in that suit claimed related apparently to the whole of items 9 and 10 and not simply to the moiety thereof, which was comprised in the deed of settlement.

Among other issues—which it is here unnecessary to refer to—the following were framed and numbered as 3 and 5 therein—“Whether Yagna Ramien gave away items 1 to 3, 7 and 8 and $\frac{1}{2}$ of 9 and 10 to the 1st defendant in 1879? Is it valid in law?” “Whether the mortgage in question was granted by the 1st defendant to the 3rd defendant for legal necessity binding on the plaintiff.” The finding on the 3rd issue was against the plaintiff, viz :—that the adopted son was bound by the disposition of property made by the adoptive father prior to, or at the time of, the adoption in favour of the 1st defendant and her daughter. On the 5th issue, the finding was that the hypothecation deed was executed without any legal necessity but that such finding became immaterial by reason of the finding on the 3rd issue so far as a moiety of items 9 and 10 was concerned. The material portion of the decree passed in that suit was as follows :—“It is decreed that

the plaintiff's suit, so far as regards plaint items 1, 2, 3, 7 and 8 of the property and half the share in items 9 and 10, be dismissed ; that it is declared that the plaintiff be entitled to the other items of properties mentioned in the plaint as the reversioner after the lifetime of the 1st defendant." There was no appeal against the said decree and the same has become final.

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Subba Dikshitar, the plaintiff therein died in December 1891 and the plaintiffs claiming under him as his only sons and legal representatives have brought this suit in 1897 against the 1st defendant and defendants 2, 3 and 4 forming members of an undivided family claiming under the 1st defendant under Exhibit IV, a sale deed, dated 6th March 1891. The plaintiffs pray that a decree may be passed declaring "that the plaintiffs alone are entitled to inherit the immoveable properties described in the schedule and directing that the same be put in possession of these plaintiffs."

A reference to para. 9 of the plaint clearly shows that the present suit does not relate to the properties comprised in the deed of settlement in respect of which the claim of plaintiff's father was absolutely dismissed as unsustainable in O. S. No. 512 of 1890, but only to the remaining properties in respect of which the plaintiffs' father was expressly declared by the decree therein to be entitled to them as the reversioner after the lifetime of the 1st defendant. The plaintiffs' cause of action as set forth in the plaint is that on the death of Venkataramanien in 1886, the properties claimed in the suit legally devolved by inheritance on his divided uncle, the plaintiffs' father—the 1st defendant being only in the position of adoptive step-mother and not adoptive mother of the deceased—and that on the death of their father, the same devolved on them by descent, as his heirs. The decree in O. S. No. 512 of 1890, which declared that plaintiffs' father was entitled to these properties as reversioner only on the death of the 1st defendant, is not impugned as obtained by fraud or collusion or delivered by a Court not competent to deliver it (Section 44 of the Indian Evidence Act). The plaintiffs seek to avoid the effect of that decree on the ground that though their father and the 1st defendant were both equally aware of all the facts which would enable one to know who the heir of Venkataramanien was, yet they were under a mutual mistake of law and assumed that the 1st defendant

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was entitled to succeed as adoptive mother and that the plaintiff's father was only presumptive reversionary heir on her death and that therefore O. S. 512 of 1890, which was brought by the plaintiffs' father in ignorance of his legal right as the immediate heir of Venkataramanien—a mistake of law which was shared in also by the Court—and the decree passed therein can be no bar to the present suit. It is also contended that in a declaratory suit which was brought by a presumptive reversioner during the lifetime of a Hindu widow no decree could be passed declaring his right to succeed to certain properties after the lifetime of the widow, but that the only decree which could be passed in his favor in such a suit is a declaration that an alienation made by the widow was made without legal necessity and therefore void beyond her lifetime [Illustration (e) to section 42 of the Specific Relief Act].

It is contended on behalf of the defendants (appellants) that the present suit is barred 1stly by section 43 and 2ndly by section 13, Civil Procedure Code. The former contention is clearly untenable and must be overruled. S 43 only requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action on which the suit is founded and not that every suit should include every claim or every cause of action which the plaintiff may have against the defendant, in respect of the object-matter of the suit (*Pittapur Raja v. Suriya Row*¹, *Ittappan v. Manavikrama*²). If the present suit had been for a declaration of the reversionary right of the plaintiff's father to succeed on the death of the 1st defendant to certain items of properties other than those comprised in the former suit, such a claim would be a part of the claim arising from the cause of action on which the former suit was founded and the suit would be barred by section 43, Civil Procedure Code. But the claim made in the present suit is one arising from a cause of action quite different from, and inconsistent with, the cause of action on which the former suit was brought and it could not possibly have been included in that suit as a part of the claim arising from the cause of action on which that suit was in fact brought.

But the other contention *viz.*—that the suit is barred as *res judicata*, is fatal to the plaintiffs' suit. It has been admitted all

1 I. L. R., 8 M. 520 at 524

2 I. L. R., 21 M. 153 at 157, 161.

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along—and the respondents' Vakil properly admits—that if the present suit could not have been maintained by the plaintiff's father if he were now alive, the plaintiffs could not stand on a different footing. The respondents' Vakil however argues that the plaintiffs' father could have himself maintained this suit, notwithstanding the decree in O. S. No. 512 of 1890. It is impossible to accede to this contention in the face of the express adjudication in the former decree that the plaintiffs' father was entitled to succeed to the properties now sued for only on the death of the 1st defendant. This necessarily implies that the 1st defendant and those claiming under her were entitled to the possession and enjoyment of the property during her lifetime. When such declaration is embodied in the decree itself, it is immaterial that no question or issue was actually raised and decided as to whether or not the plaintiffs' father was entitled to succeed to the properties on the death of Venkataramanien as his immediate heir—which is the claim on which the present suit is founded. This claim cannot be allowed and declared in the present suit and plaintiffs put into possession by ejecting the defendants, without virtually setting at naught the decree in O. S. 512 of 1890. The declaration which is sought for in this suit viz:—that the plaintiffs' father was entitled to the possession of the properties on the death of Venkataramanien is diametrically opposed to the declaration made in the former decree viz:—that he was entitled to possession only after the death of the 1st defendant; and the present suit is therefore clearly barred as *res judicata*, quite independently of explanation I or explanation II to section 13, Civil Procedure Code.

The operation of a decree as *res judicata*, so far at any rate as the object-matter of a direct adjudication contained in the decree is concerned, can in no way be affected, in the absence of fraud or collusion, by the fact that the suit was the result of a mistake of law or that the decree proceeded on such mistake. The remedy, if any, in such a case, can only be by way of review and certainly not by a separate suit for relief on the ground of mistake. Article 96 of Act XV of 1877 cannot be relied upon as sanctioning such a suit and it is therefore unnecessary to consider the plea of limitation which was raised by the defendants with reference to that article. It may here be mentioned that the mistake of law committed in

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O. S. 512 of 1890 by all the parties therein concerned—including the judge—which is supposed to have been discovered only in 1897, subsequent to the decision of this Court and of the Privy Council in the *Oothoomalai case*¹ might well have been discovered in 1890 at the time of the institution of the former suit itself on reference to the decision of the Privy Council in the *Ramnad adoption case*² in which the point of Hindu Law in question was laid down just as it has since been decided in the *Oothoomalai case*¹—to say nothing of *Kasheshuree v. Girish Chunder*³.

As for the contention principally relied upon by the learned pleader for the respondents, that the decree in the former suit, in so far as it declared that the plaintiffs' father was entitled to the items of properties now sued for—being a portion of the properties comprised in the former suit—as reversioner, after the lifetime of the 1st defendant, should be treated as null and void, by reason that no such declaration could legally have been made inasmuch as the plaintiffs' father was only a presumptive reversionary heir during the lifetime of the 1st defendant, it is admitted and cannot be denied that the Court which passed that decree was a Court of competent jurisdiction to pass such declaratory decree if the plaintiff was entitled to such declaration. The plaintiff's father prayed for such declaratory decree and apparently no objection was raised to it by the 1st defendant and the Court did make such declaration by its decree, though the suit was dismissed as regards the items of property comprised in the deed of settlement. The correct view, no doubt, is that such a declaratory decree ought not to have been passed and that the decree in O. S. 512 of 1890 should have been simply limited to the dismissal of the suit. But it is now too late to seek to set aside the remaining portion of the decree as if the present suit was an appeal from that decree. Whatever may be the correct view, such decrees have sometimes been passed and as between the parties thereto, they must be held to be binding and to operate as *res judicata*, just like any other declaratory decree passed under section 42 of the Specific Relief Act (vide section 43 of the Specific Relief Act), notwithstanding that it is now conclusively shown that such declaratory decree ought not to have been passed with reference to the proviso to S. 42, by reason that

1. I. L. R., 23 M. 1. 2. 12 M. I. A., 424, 446, 447. 3. (1864) W. R., 71.

the then plaintiff was, at the date of the suit, able to seek further relief than a mere declaration of title, but omitted to do so. The binding effect of judicial decrees and adjudications cannot be allowed to be questioned between the parties thereto and their representatives merely because they have proceeded upon an erroneous view of law or on a view of law which though rightly or wrongly then believed to be sound has now been exploded.

No doubt if this contention of the respondents were acceded to, the decree in O. S. 512 of 1890, in so far as it dismissed the claim of the plaintiffs' father to certain items of property therein comprised—which do not form a portion of the subject-matter herein—would not operate as *res judicata* to the present suit, for the ground of dismissal was that the settlement made by Yagna Ramien, comprising the said items, was binding upon the adopted son and in that view it was immaterial whether plaintiffs' father was or was not either the immediate or the reversionary heir of the adopted son and neither explanation I nor Explanation II to section 13, Civil Procedure Code, will apply to a matter which was not necessary for the decree passed in the suit, any more than a finding on an express issue in the suit would operate as *res judicata* when such finding became immaterial for the final decree passed therein.

On the ground therefore that the declaratory portion of the decree in O. S. 512 of 1890 is a bar to the present suit, this Letters Patent Appeal must be allowed and the order of this Court in A. A. O. No. 72 of 1900 as well as the order of the Lower Appellate Court are reversed and the decree of the District Munsif restored with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*
and Mr. Justice Moore.

The Sub-Collector of North Arcot through
the Collector of North Arcot *Referring Officer.*
v.

V. C. Seshachariar, 2nd Grade Pleader,
Vellore *Defendant.*

Legal Practitioner's Act (XVIII of 1879) S. 13.—“Other reasonable cause.”—Departmental inquiry—Anonymous letter by pleader—Intention to influence mode of enquiry—Professional misconduct.

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The Sub-Collector of North Arcot v. V. C. Seshachariar. A legal practitioner addressing an anonymous letter to a Sub-Collector holding a departmental inquiry into a charge of bribery against a Revenue Inspector and intending by such letter to influence the mind of the officer holding the enquiry in connection with the matter he is investigating is guilty of misconduct and may be properly suspended "for other reasonable cause" under S. 13, cl. (f), Legal Practitioners' Act.

In the matter of Purna Chunder Pal Mukhtear, I. L. R., 27 C. 1023 followed.

Case stated under section 14, Act XVIII of 1879 by the Sub-Collector of North Arcot through the Collector of North Arcot in his letter, dated 11th February 1902, Dis. No. 259—Revenue of 1902 referring for the orders of the High Court the conduct of the defendant herein.

P. S Sivasami Aiyar for K. Srinivasa Aiyangar for the Pleaders' Examination Board.

C. Sankaran Nair and V. V. Srinivasa Aiyangar for the defendant.

The Court made the following.

ORDER :—On a careful consideration of the evidence we think it is clear that the pleader meant that the letter should reach the hands of the Sub-Collector as an anonymous letter and we think he aggravated his original offence by attempting to make out that he intended the letter to be signed by his clients and he thought it was going to be so signed before it was despatched to the Sub-Collector.

On the other hand, the Pleader's conduct in making no attempt to conceal the fact that the letter was written and sent by him although its purports to have been written by "one of the witnesses in this case," seems to show that he entirely failed to appreciate the impropriety of his Act.

The evidence establishes that the pleader wrote a letter which he did not sign, to an officer who was conducting an enquiry into a charge of bribery against a Revenue Inspector, in which letter he made allegations which were intended to prejudice the mind of the officer in connection with the matter which he was investigating.

We are prepared to accept the interpretation of clause (c) of section 13 of the Legal Practitioners' Act (XVIII of 1879) which was adopted by the Calcutta High Court in *In the matter of Purna Chander Pal, Muktear*¹ and we think the facts in the present case show other reasonable cause, for suspending or dismissing a pleader within the meaning of this Clause.

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In all the circumstances we think a suspension of the certificate for one month will meet the requirements of the case and we make an order accordingly.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Bhashyam Aiyangar.

In re Pachai Ammal ... Petitioner (1st accused).

Criminal Procedure Code S. 195—Magistrate granting sanction—Propriety or legality of sanction—Jurisdiction of Magistrate trying complaint to question.

In re.
Pachi Ammal

The propriety or legality of a sanction granted under S. 195, Cr. P. C., by a competent Magistrate cannot be questioned by the Magistrate who tries the complaint instituted in pursuance of such sanction,

Petition, under sections 435 and 439 of the Criminal Procedure Codes, praying the High Court to revise the Judgment of the Court of Sessions, Salem Division, in Criminal Appeal No. 36 of 1902, confirming the sentence passed by the Joint Magistrate of Salem in C. C. No. 30 of 1902.

N. Grant for the petitioner.

The Court made the following

ORDER :—The Magistrate before whom a prosecution is instituted in pursuance of a sanction given under section 195 of the Criminal Procedure Code by a competent Court, cannot question the propriety or legality of the sanction given by the Magistrate in respect of an offence of the kind mentioned in section 195 which is alleged to have been committed in any proceeding before his court.

The petition is rejected.

Cr. R. C. 373 of 1902,

1st September 1902.

Cr. R. P. 235 of 1902.

1. I. L. R. 27 C. 1023.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Madhavaya Appellant*
(1st Defendant.)

v.

Kerala Varma Arasu and others . . . Respondents.
(Plaintiffs and defendants 2 to 7.)

Madhavaya *Civil Procedure Code, S. 13, Expl. V "Bona fide litigating"—Decree against Karnavan,*
v. *binding nature of, on junior members—Res judicata—Non-production of docu-*
Kerala *ments—Difference of opinion in weight attachable to documents.*
Varma.

Where a Karnavan suing or sued in a representative capacity litigates *bona fide* the decree passed in such suit in the absence of fraud or collusion will bind the junior members of the tarwad whom he represented.

Where a decree has been passed against a person who sues or is sued in a representative capacity, the person or persons represented by him are bound by the decree in the absence of any fraud or collusion. Negligence in the conduct of the suit, however gross, if it did not amount to fraud or collusion will not entitle him or them to avoid the decree.

The mere fact of non-production of certain karars or the mere fact that courts might now give weight to them though no weight was attached to them by the court which tried the former suit would be no proof of want of diligence and honesty, i.e., want of *bona fides* within Expl. V. to section 13, C. P. C., on the part of the Karnavan so as to entitle the junior members to rip open the former decree.

Second Appeal from the decree of the District Court of South Canara in A. S. No. 277 of 1899 presented against the decree of the Court of the District Munsif of Kasargod in O. S. No. 47 of 1898.

A Karnavan brought a suit to have a decree passed against his predecessor set aside, and it was dismissed. The present suit was by the junior members for the same relief, and the plaintiffs who were met by the plea of *res judicata* alleged that their Karnavan was guilty of gross negligence in the conduct of that suit and did not file certain material documents.

C. V. Anantakrishna Aiyar for *P. R. Sundara Aiyar*, for appellant.

K. Narayana Row for respondents.

The Court delivered the following

JUDGMENT :—We do not think that the decrees of the courts below can be sustained. We think that the suit is barred as *res judicata*.

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The only fact relied on by the Lower Courts as proof of want of diligence and want of honesty in the conduct of the suit No. 171 of 1896 on the file of the District Munsif of Kasargod is the fact that certain Karars were not produced which the courts now think ought to have been filed in the interest of the tarwad. This is certainly not sufficient to show that the suit was not conducted *bona fide* by the plaintiffs therein, viz., the successor of the Karnavan against whom the decree in O. S. 192 of 1894, on the file of the Kasargod Munsif's Court was passed and the senior Anandran of the family, who was the *de facto* manager of the family under a Karar. The suit was actively and earnestly prosecuted, and the plea founded on the conditions in the Karars was strongly pressed by the plaintiffs, but was overruled by the court. It is not suggested that there was fraud or collusion in the conduct of that suit. The fact that the Karars are produced in the present suit and that the judges in the present suit attach an importance to them which the judge who decided the suit of 1896 did not attach to the plea founded on them cannot legally warrant the inference that the plaintiffs of 1896 did not litigate the suit *bona fide* within the meaning of explanation V of section 13 of the Civil Procedure Code in respect of the right now claimed.

We must hold that the suit is barred as *res judicata* by the decision in O. S. No. 171 of 1896.

We set aside the decrees of the courts below and dismiss the suit with costs throughout:

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Bhashyam Iyengar.

In re T. Murugesu Mudaliar Petitioner.

(Complainant.)

Transfer—Case pending before a Presidency Magistrate—Transfer to another Presidency Magistrate.

In re
T. Murugesu
Mudaliar.

Quere :—Whether the High Court can transfer a case from one Presidency Magistrate to another Presidency Magistrate both being members of one and the same court.

In re
T. Murugesu
Mudaliar.

Application praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to transfer the case No. 1034 of 1902 on the file of the Presidency Magistrate's Court, Black Town, Madras, pending enquiry before Charles Gahan Esquire, Presidency Magistrate, from the file of the said Magistrate, to the file of any other Presidency Magistrate, Black Town, Madras, for enquiry and trial.

S. S. Venkatarumana Iyer for petitioner.

The Court made the following

ORDER :—There are no proper grounds for a transfer even if this court can transfer a case from one Magistrate to another Magistrate presiding over the same court.

The petition is dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies and Mr. Justice Benson.

Seni Chettiar	...	...	...	...	Appellant*
					(Plaintiff).
v.					
Santhanathan Chettiar	...	...	...	...	Respondent
					(Defendant).

Seni Chettiar *Civil Procedure Code, S. 496—Suit for damages for a wrongful injunction—Title defective*
v. *for want of registration—Right to recover damages dependant on title.*
Santhanathan
Chettiar.

Damages under S. 497 must be awarded by an order of Court in the suit in which the injunction is obtained wrongfully and even then only when it appears to the Court deciding the suit that there is no probable ground for instituting the suit.

A person whose title could not be recognised for want of registration and against whom an injunction had been obtained pending a suit for perpetual injunction which was ultimately dismissed as against him on the ground that the conduct of the plaintiff in that suit was fraudulent could not maintain a suit for damages for a wrongful injunction as he could not prove his title to recover damages and S. 497 would not help him in a such a case.

Appeal from the decree of the Additional Subordinate Judge's Court of Tinnevely in O. S. No. 66 of 1899 (O. S. No. 17 of 1898 on the file of the Subordinate Judge's Court of Tinnevely).

Defendant and one Minakshinathan Chetti were lessees of the village of Pattamputhur in Satur Taluq for 10 years from Fasli 1294 to 1304. Under the lease they were entitled to cut trees in the bed of a tank in the said village. Minakshi gave up his rights in favor of defendant, and the latter gave by an yadast the right of cutting and enjoying from 1st January 1901 to the close of Fasli 1304 the trees in the bed and the outer bunds of the tank. This yadast was unregistered and the defendant brought a suit for injunction ignoring the yadast to restrain the plaintiff herein from entering the tank-bed and bunds and cutting the trees. It was held ultimately by a Full Bench of the High Court that the yadast ought to be registered and that it was, therefore, not admissible in evidence but that as the defendant's conduct was fraudulent, he was not entitled to an injunction. His suit was therefore dismissed. Pending the defendant's suit for a permanent injunction he obtained a temporary injunction before the Sub-Court restraining the plaintiff herein from cutting the trees &c. The plaintiff now brings this suit for damages for an improper and illegal injunction. The Sub-Court held that the plaintiff had no legal title, the yadast being unregistered and that as he must rely upon title to recover damages, he cannot maintain this suit. Hence this appeal.

C. Ramachandra Row Sahib for appellant.

V. Krishnasami Aiyar and *A. S. Balasubramania Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—Section 497 of the Civil Procedure Code has no application to this case. Damages under that section must be awarded by an order of the court in the suit and can only be given if it appears to the court deciding the suit that there was no probable ground for instituting the suit. We agree with the Subordinate Judge in the view he has taken of this case in paragraph 7 of his judgment and dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Sivaraman Chetty and another Appellants*
(Defendants).

v.

Kuppumuthu Chetty Respondent.
(Plaintiff).

Sivaraman Chetty v. Kuppumuthu Chetty. *Prior and puisne mortgagees—Suit by prior mortgagee—Puisne mortgagee no party—Purchase under prior mortgage-decree—Suits by puisne mortgagee—Prior mortgagee and purchaser no party—Suit by puisne mortgagee to redeem prior mortgagee—Right of assignee of equity of redemption to redeem.*

A puisne mortgagee is not bound by a decree obtained by a prior mortgagee in a suit to which the puisne mortgagee was no party.

A sale held in pursuance of such decree will pass to the purchaser only the equity of redemption. Where a puisne mortgagee obtains a decree on his mortgage without joining the prior mortgagee and the purchaser in execution of the prior mortgage decree and purchases the property he does not acquire any rights on the footing of the purchase. He is however entitled to bring a suit for redemption of the prior mortgage.

Such redemption, however, will not affect the right of the purchaser at the sale held in execution of the prior mortgage decree or his assignee from redeeming in his turn as owner of the equity of redemption such puisne mortgagee on payment of the amount due to him under the mortgage.

Where the puisne mortgagee held two mortgages, one of which covered the plaintiff property subject to the prior mortgage but the other comprised besides this property some other items not the subject-matter of the suit :—

Held, that the question of the right of the assignee of the equity of redemption to redeem the puisne mortgagee could not be gone into in the suit brought by the latter for redemption of the prior mortgage

Appeal from the order of the District Court of Madura in Appeal Suit No. 380 of 1901, presented against the decree of the Court of the District Munsiff of Dindigal in Original Suit No. 245 of 1900.

The defendant had a mortgage of one item of property dated 4th November 1890. This item together with two others were mortgaged to plaintiff on 21st May 1891. The 1st defendant brought a suit on his mortgage in 1892, obtained a decree, and in execution he purchased the property himself. But the plaintiff

was no party to this suit. The plaintiff brought a suit on his mortgage without making defendant a party, obtained a decree and in execution he purchased the property. This purchase was subsequent to the defendant's purchase, and as the mortgagor had lost his right to the property on that date, nothing passed to the plaintiff. The present suit was brought by the plaintiff—subsequent mortgagee—to redeem the defendant—prior mortgagee—and recover possession of the one item on payment of the decree debt due to him. The District Munsif dismissed the suit holding that the plaintiff was not entitled to redeem. The District Judge reversed his decision and remanded the case for decision. Against the order of remand the defendant appealed under Sec. 588.

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V. C. Desikachariar for appellant:—As I have become the purchaser of the mortgagor's interest, I am entitled to redeem the plaintiff. [*Bhashyam Aiyangar, J.*—You did not make him a party to your suit. He is entitled to redeem you as prior mortgagee. Then as you now stand in the position of the mortgagor, you may redeem him by paying the amounts of the two mortgages]. That is a circuitous process. The whole thing may be done by permitting me to redeem him on payment of the amount due to him. The proper suit will be for a direction that the defendant should redeem the plaintiff and that on default the property should be sold. [*Bhashyam Aiyangar, J.*—This suit is perfectly in order. As subsequent mortgagee he is entitled to redeem you. In a subsequent suit you may redeem all three items as the assignee of a part of the equity of redemption.] It has been held in 16 Mad. that redemption is not the proper course. And the whole thing may be done in a single suit [*Bhashyam Aiyangar, J.*—16 Mad. is in conflict with later cases and the judge notices it. Moreover we may try to work it all in this suit if this were the only property you may have to redeem in a subsequent suit. The other two items will also be the subject-matter of the suit. This suit must properly end with his redeeming you. Your right to redeem him will be dealt with in another suit.] I can show that 16 Mad. does not conflict with later cases. [*Bhashyam Aiyangar, J.*—If there is no conflict, the result will be as I suggest. There is a good deal of conflict which it is unnecessary to go into in this case. This case is simple]. In the subsequent suit I shall not be entitled to claim redemption of all three items. I have purchased only one item. *Bhashyam Aiyangar, J.*—

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A purchaser of part of equity of redemption is entitled to redeem the whole. You will have a charge upon the other two items for the amount you have paid for the redemption of those items]. But those two items are now vested in the plaintiff. *Bhashyam Aiyangar*, J.—If that is so the amount you will have to pay for redemption of your item will be adjusted with reference to all these items.] But all parties interested are before the court and the whole case may be disposed of here. *Bhashyam Aiyangar*, J.—The other properties are not before the court. The strictly correct course is to allow him to redeem you in this suit. The other questions will be decided in the suit for redemption you may bring. To accept the course you suggest will require the amendment of plaint]. The District Munsif asked the plaintiff to amend his plaint, but he refused to do so. *Bhashyam Aiyangar*, J.—His suit for redemption is properly brought. It is for you to bring a fresh suit for redemption. The amendment will alter the nature of the suit.]

P. S. Sivaswami Aiyar for respondent suggested that the remand was right as the District Munsif had not decided the other issues, the amount payable for redemption, etc. [*Bhashyam Aiyangar*, J.—No other issues to be decided. There is no dispute as to amount. The Judge should dispose of the case according to law.]

The Court delivered the following

JUDGMENT :—The judge should not have remanded the suit to the District Munsiff. The whole case and all the materials necessary for adjudication were before him and he should have disposed of the appeal. The 1st defendant having obtained a decree on his prior mortgage without forming the plaintiff as a party and having in execution purchased the mortgaged property, the right of the plaintiff as a puisne mortgagee to redeem the 1st mortgage is not affected by either the decree or sale. The only effect of the sale will be to transfer to the 1st defendant, the purchaser, the equity of redemption of the mortgagor who alone was a party to that suit. The plaintiff is therefore clearly entitled to redeem the prior mortgagee in favour of the 1st defendant without prejudice to the right of the 2nd defendant as assignee from the 1st defendant of the mortgagor's equity of redemption to redeem the plaintiff on payment of the amount of the mortgage on the item of property mentioned in the plaint and the proportionate amount of the 2nd

mortgage chargeable on the said item of property, which alone is comprised in both the mortgages after he (the plaintiff) has redeemed the 1st mortgage. This cannot be done in the present suit for the reason at any rate that the plaintiff's 2nd mortgage comprises not only the plaint item but two other items the mortgagor's equity of redemption in which has passed to the plaintiff in virtue of the sale held in execution of the decree passed in the suit brought by the plaintiff on the 2nd mortgage against the mortgagor alone without joining as a party the 1st defendant the prior mortgagee of one of the 3 items comprised in the 2nd mortgage. We set aside the decree of the District Judge and remand this appeal for disposal by him according to law, with reference to these remarks. Costs will be costs in the cause.

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Chetty
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Knppumuthu
Chetty.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies and Mr. Justice Moore.

Mahadeva Pandia ... Appellants *
(1st and 2nd
Defendants.

v.

Rama Narayana Pandia ... Respondent.
(Plaintiff and 3rd
Defendant.)

Hindu law—Marriage of members—Member holding office and in possession of family funds—Presumption of family property—Onus on member to shew self-acquisition—Life insurance Policy—Premium paid out of savings—Policy, character of—Asset available for division.

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The cost of the marriages of the members of a Hindu family is a legitimate charge on family funds. Where family jewels to the value of Rs. 800 have been expended on such occasions, these are not assets available for partition.

Where a member of a Hindu family is holding an office under Government (which fetches him a separate income) and is in possession of family funds and has been managing or helping to manage the family property, it lies upon him to show that what he claims to be his separate property has not been acquired by family funds.

A Life Insurance Policy held by a member is not an asset available for division during his lifetime and must be treated as the separate property of the member where he pays the premium out of the savings of his salary.

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Appeal from the decree of the District Court of Chingleput
in O. S. No. 6 of 1899.

T. Rangachariar for appellants.

V. Krishnaswami Aiyar and *S. Srinivasa Aiyangar* for 1st
respondent.

V. K. Rangachariar for 2nd respondent.

The Court delivered the following

JUDGMENT :—The following are the undisputed facts of this case. The plaintiff and the defendant's father were brothers. They both got employment about the year 1870 in the Public Works Department as Overseers with decent salaries. The defendant's father died in 1875 leaving three infant boys aged from 6 years downwards, the present three defendants. After his death these three children lived with their paternal grandfather, the plaintiff's father, in Saint Thomas Mount, Madras. The plaintiff lived in distant places whenever he was posted for work. The family had then property consisting of houses and land valued at some Rs. 6,500 yielding a rental of from Rs. 300 to 400 a year, and a fund of Rs. 8,000 invested in Government promissory notes of the 4 per cent. loan. There were also valuable family jewels which the plaintiff values at Rs. 8,200. The defendants admit that the plaintiff is entitled to his half share of the houses and land and to a half share of the fund of Rs. 8,000, which converted into other securities is admittedly in the plaintiff's possession now. They also admit that he is entitled to half of the family jewels in their possession, but their value, they say, is only Rs. 1,200 as against the Rs. 8,200 claimed. The judge has allowed the greater part of the plaintiff's claim in respect to these jewels, and the defendants appeal on this point. They also appeal in regard to the properties which they say are family properties in the plaintiff's possession which ought to have been brought into hotchpot. They confine their appeal to a house worth Rs. 2,400, jewels worth Rs. 4,200, various funds worth Rs. 16,000 and decree amounts worth Rs. 1,500, or to properties worth in round numbers Rs. 24,000. The judge disallowed these as well as other claims they have now abandoned,

on the ground either that the properties was non-existent or was the self-acquisition of the plaintiff. The plaintiff admits the existence of the house worth Rs. 2,400, of jewels worth Rs. 4,200, and of funds worth Rs. 6,000 over and above the fund of Rs. 8,000 already referred to, but claims all these items as his own on the ground that they were acquired with his own funds. The defendants have failed to prove the existence of any other properties than those admitted by the plaintiff. Therefore, the only two questions we have to decide in appeal are, first, what is the value of the jewels that are or ought to be in the possession of the defendants, and, secondly, whether the properties admittedly in the possession of the plaintiff and claimed by the defendants as family properties are such, or whether they are the plaintiff's self-acquisitions.

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In regard to the first question we find, on what must necessarily be a rough calculation, that the value of the family jewels for which the defendants are answerable is Rs. 6,000 as against the Rs. 8,200 claimed by the plaintiff and Rs. 1,200 admitted by the defendants. The plaintiff has included in his claim for Rs. 8,200 for jewels, several jewels which were admittedly missing when he took stock of them and made out a list of what were missing (Exhibit XI). The ascertained value of some of these amounts to Rs. 900. But there are two or three other valuable jewels, such as neck ornaments, of which the exact value cannot be traced, but of which the approximate value cannot be less than Rs. 300 or 400. We agree with the District Judge that the defendants are not responsible for these missing jewels, as their step-grand-mother was in actual possession of all the family jewels till her death in 1895, so Rs. 1,300 must be deducted on this account, plus Rs. 100 the value of a gold ring set with rubies which the plaintiff admits he has taken possession of. We also think that the defendants are entitled to deduct another Rs. 800 for jewels expended on the occasion of the marriages of two of them. The cost of these marriages was a legitimate charge on the family funds and the plaintiff contributed nothing towards it. So that, deducting Rs. 2,200 in all from Rs. 8,200 claimed, we have a balance of Rs. 6,000 chargeable to the defendants on account of the family jewels, as we agree with the judge that their dissipation of the

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bulk of them in other ways was quite unjustifiable, assuming it to be true.

In regard to the second question the plaintiff's case is that he left the entire management of the family property to his father and never asked for or received a penny of the income himself. He lived on his salary and, besides, saved a good deal, out of which he acquired the properties in dispute. Not only did he forego his claim on the family property, but he used to make remittance to his father and the defendants by way of presents. This generosity he continued for twenty years, even after his father's death in 1892. Now, this conduct on the plaintiff's part is hardly natural, and is belied by his present conduct in suing for a partition of the family properties, when he is in more need of them now than he was before. But apart from this, the defendants have been able, handicapped as they have been by a long period of minority, to adduce evidence quite sufficient to show that the plaintiff's story is false. In his plaint he stated that his father was in management until his death in December 1892, and that after that the defendants have been in management. But in his evidence he was forced to admit that he himself held the management from 1889 when his father was seized with paralysis until 1892, and it is abundantly proved by the documentary evidence in the case, such as letters written by him to the defendants and by his own admissions, that the person who was managing the family property ever since 1892 is himself. He admits that he has held a fund of Rs. 8,000 under his sole control since 1889, and all that he seems to have done was to leave the land and the house property in the immediate charge of the defendants while constantly interfering in the management of that property also. Such being the state of affairs since 1889, the probability is that the state of affairs prior to 1889 was the same, that is, that the plaintiff controlled the fund of Rs. 8,000 while his father controlled the houses and landed property. They yielded about an equal income. That the plaintiff had some such fund to fall back upon is proved by the fact that in the year 1876, the year after the defendants' father's death, he paid into his own account with Messrs. Arbuthnot & Co., sums aggregating Rs. 1,900, his whole salary, and allowance for that year being only Rs. 1,000. We also find that from 1875 to 1887 he made remittances to his father. He says these

payments were made in obedience to his father's demands and that they were purely charitable, but it is impossible to believe this. If his father was enjoying the income of the whole of the family property, he could have required no assistance from the plaintiff. The funds, the father had, were ample, namely, an income of Rs. 600 or 700 a year for the support only of himself, his wife and the three infants of his son. And the plaintiff's story in respect to these remittances to his father will in no way account for his making remittances to the defendants themselves on a much larger scale from the year 1889 to 1895.

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There can, therefore, be no doubt that these payments were made out of family resources. Again we find in what the plaintiff calls his own private account entries made in the year 1874 of two sums of Rs. 260 and Rs. 40 paid in by the defendants' father, which, in the absence of proof to the contrary must be taken to have been on family account. The plaintiff's explanation that these monies were really his own, and that the defendants' father was only the medium for carrying them to the plaintiff's account, has absolutely nothing to support it. Then we have letters written by the plaintiff to his father regarding family properties. Exhibit A in February 1885 about investments of family funds, Exhibit X about family debts (the date of this Exhibit is not stated, but it must have been in some year previous to 1886 as shown by the intrinsic evidence) and Exhibit XXVI in July 1884 about remittances to the family. All these things combine to show that the plaintiff has all along been managing or helping to manage the family property and that he had family funds in his possession. Such being the case it lay on the plaintiff to show that what he claims to be his separate property, was not acquired by means of the family funds which he was controlling. He has not attempted to do this. He has not even produced any family accounts previous to 1892, to show that the family had not sufficient funds to make these acquisitions. The presumption, therefore, is that the properties he holds are family properties, as he was in possession of family funds from which he could have made the acquisitions. We accordingly so find on the second question.

The plaintiff will, therefore, have to give up to the defendants half the house worth Rs. 2,400, half of Rs. 4,200 the value of the

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jewels and half of the fund of Rs. 2,000 invested in the Commercial Bank which are in his possession. The remaining fund of Rs. 4,000 which the plaintiff also has, is said to be the present surrender value of a Life Policy for Rs. 10,000 which the plaintiff has in the Oriental Life Insurance Company. We do not think the defendants are entitled to a share in this. We consider that the premiums paid by the plaintiff on account of this insurance can fairly be treated only as made from savings out of his own salary for the ultimate benefit of his wife and daughter. At all events it cannot be treated as an asset available for division during his life-time, for it is within his power to throw the insurance up altogether.

The result is that in supersession of the preliminary decree of the District Judge we shall pass a decree for the equal division by metes and bounds of the lands in plaint schedule A and of the houses in plaint schedule B, and of the house in the defendant's schedule I, one of which shares is to be delivered to the plaintiff and the other to the defendants and we shall direct the plaintiff to make over to the defendants half of the funds amounting to Rs. 8,600 in the plant schedule D and half of the Rs. 2,000 invested in the Commercial Land Mortgage Bank (item No. 11 in defendant's schedule 3) and we shall direct the defendants to pay to the plaintiff Rs. 1,000 being the balance left after allowing the plaintiff Rs. 3,000 on account of his half share of the jewels in plaint schedule C and the defendant Rs. 2,000, on account of their half share in defendants' schedule 2.

The parties having lost and gained equally and both being to blame, we direct that each party do bear their own costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson, and Mr. Justice Moore.

Sri Rajah Venkata Narasimha Appa Row

Bahadur Zemindar... ... **Appellant ***
(*Plaintiff*).

Nootulapati Parvatulu ... Respondent
(1st Defendant).

Zamindar and ryot—Relinquishment by ryot—Grant by Zemindar of relinquished land to another ryot—One patta for both lands—Rights of permanent occupancy—Presumption—Kudivaram.

In the case of lands held by a ryot it is upon the Zemindar to show that the Kndivaram vested in him and that the ryot possesses no permanent rights of occupancy.

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Venkata
Narasimha
Appa Row
Bahadur
v.
Nootulapati
Parvatulu.**

Venkatanarasimha Naidu v. Dandamudi Kotayya, 1. L. R. 20 M. 299 followed.

Where a ryot relinquishes the patta lands in which he has permanent rights of occupancy to the Zemindar and the latter grants the land to another ryot holding other lands over which he has permanent rights of occupancy and both lands are entered in the same patta.

Held (1) that the Zemindar must show that he has made the grant under circumstances entitling him to eject at the end of any year,

and (2) that the ryot possesses right of permanent occupancy in respect to the relinquished lands granted to him.

Chekati Zemindar v. Ranasoru Dhora, I. L. R. 23 M. 318 followed.

Second Appeal from the decree of the District Court of Kistna in A. S. No. 67 of 1900, presented against the decree of the Court of the District Munsif of Bezwada in O. S. No. 389 of 1898.

The plaintiff, a Zamindar, brought this suit for ejecting the defendants, his tenants, from 5 items of lands on the ground that they were only tenants from year to year, that due notices to quit were given and that notwithstanding, the defendants have not delivered possession. The defendants contended that they were not entitled to be ejected as they were occupancy tenants. The District Munsif held that 2 items were relinquished by the then tenants and were then given to the defendants on their application and that as to the latter the defendants were only tenants from year to year. He, therefore, gave a decree as to these 2 items and

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dismissed the suit as regards the others. The tenants appealed against the said decree and the Zamindar filed a memo. of objection with regard to the 3 items disallowed. The District Judge held that even as to the relinquished lands the defendants had occupancy rights and therefore reversed the decree and dismissed the suit on the authority of *Chekati Zemindar v. Ranasoru Dhora*¹. Hence this second appeal by the Zamindar.

Raja T. Rama Rao for appellant.

P. Nagabhushanam for respondent.

The Court delivered the following

JUDGMENT:—We think that the decree of the District Judge is right. The question was whether the plaintiff was entitled to eject the defendants. In the case of two of the plots of land it appears that a relinquishment of the Kudivaram right was given to the Zamindar some 20 years ago by the then occupying ryots and that a year or two afterwards that right was granted to the 1st defendant; and the lands were entered with his other lands in his ordinary *Seri puttah*. In the case of the other plots of land there was nothing to show that the Kudivaram right had ever vested in the Zamindar. As regards these latter lands it is evident that the principle of *Venkatanarasimha Naidu v. Dandamudi Kotayya*² applies, while in the case of the two former plots of land it was for the Zamindar to show that he made the grant under circumstances or on conditions which entitled him to eject the defendants at the end of any year. We think that the entry of the lands in the same puttah as the lands from time immemorial in the enjoyment of the ryot without any condition that they were held on a different tenure leads to a reasonable inference that they were to be held on the same tenure, i. e., with permanent occupancy rights. It was, no doubt, open to the Zamindar to rebut this presumption but he has not done so. We think that in all the circumstances the Judge was right in applying the rule laid down in *Chekati Zemindar v. Ranasoru Dhora*¹ and we dismiss the second appeal with costs.

1. I. L. R., 28 M. 299.

2. I. L. R., 20 M. 318.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

FULL BENCH.

Present:—Mr. Justice Subrahmanya Aiyar, Mr. Justice Davies
and Mr. Justice Benson.

The Maharaja of Vizianagaram by his
guardian and next friend F. W. Gillman ... *Appellant* in both*
v. ... *cases (Plaintiff).*

Sri Rajah Setrucherla Somasekhararaz
Bahadur ... *Respondent in*
... *A. 187 of 1900 (Deft.)*

_____ Ramabhadraraz
Bahadur ... *Respondent in*
... *A. 188 of 1900 (Deft.)*

Madras Revenue Recovery Act (II of 1864), Ss. 2 and 42—Transfer of Property Act, Ss. 82 and 100—Civil Procedure Code, S. 43—Limitation Act, S. 20, Arts. 61, 99, 120 and 132—Co-sharers of an estate—Decree against one for partition and mesne profits—Alienation by judgment-debtor co-sharer—Revenue in arrear subsequent to sale—Attachment by Collector of vendor's share—Realization of revenue—Purchaser's claim for contribution against other sharers—Charge against estate of other sharers—Suit to enforce charge—Period of limitation—Suit to enforce personal liability—Limitation.

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Where subsequent to a decree for partition of an estate in the possession of the managing member who was accountable to the other members for mesne profits the managing member sold his interest to a third person and the revenue due upon the whole estate not being paid the Collector attached the managing member's share and realised the arrears due upon the whole estate from such share.

Held by the Full Bench that the purchaser had a charge upon the estate of each of the other co-sharers for their share of the revenue.

*Seshagiri v. Pichhu*¹ followed, *Kinuram Dass v. Morafar Hussaini*²; *Seth Chitor Mal v. Shib Lal*³; and *Shivarao v. Pandlik*⁴ dissented from.

Per *Subramania Aiyar, J.*—"Justice, equity and good conscience" ought to be resorted to and are universally accepted as words compendiously denoting those ultimate principles of what is right and proper, fair and reasonable and good and expedient, which principles are resorted to by Judges in dealing with difficult questions not directly governed by existing precedents which often arise in the course of the administration of justice.

Per *Benson, J.*—The words "charge created by operation of law" are more extensive than "charge created by law" and includes a charge created directly by the provisions of an Act as well as a charge created indirectly as a legal consequence of certain conditions.

The charge to the purchaser was directly created by Sections 2 and 42 of Act II of 1864 and was a charge by operation of law within the meaning of S. 100, Transfer of Property Act.

* 23rd December 1902.

A. Nos. 187 & 188 of 1900.

1. I. L. R., 11 M. 454.

3. I. L. R., 14 A. 273.

2. I. L. R., 14 C. 809.

4. I. L. R., 26 B. 437

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Per *Bhashyam Aiyangar and Moore, JJ.*

The purchaser's claim is not barred by S. 43, C. P. C., by reason of his omission to join the present defendant as a party in a former suit brought by him against other co-sharers.

*Gangi v. Ramasami*¹ approved.

The purchaser's right to claim contribution arises notwithstanding he may not have paid any money in discharge of the revenue and the Collector may have realized the same out of the income of the share belonging to the purchaser.

The right to claim contribution exists whether the party seeking contribution makes the payment voluntarily or involuntarily, i. e., whether he makes the payment and thus averts coercive process against his property or without making such payment suffers his property to be seized under process of law for the purpose of the amount being realized from its income or by its sale.

*Rodgers v. Mau*² approved.

"Money paid" in Article 61 or 99 of Act XV of 1877 includes "money voluntarily or involuntarily paid."

The receipt by a mortgagee of the produce of land mortgaged to him is a payment within the meaning of S. 20 of Act XV of 1877.

Article 120 does not apply to a suit for contribution in a case where the amount was realized by sequestration or sale of the property of the person seeking contribution.

Where moneys have been received in excess of plaintiff's share of revenue from time to time under Art. 99, a suit for contribution will be barred as regards such portion of the excess as have been recovered more than 3 years before suit.

Art. 99 applies to cases of suits brought for contribution by a co-sharer of an estate registered in the joint names of several. If the estate is registered in the name of one and the others are interested, Art. 62 will apply.

Per *Bhashyam Aiyangar, J.*

A co-sharer's claim for contribution where he pays or is forced to pay arrears of revenue due upon the entire estate is a charge upon the estate of the other co-sharers.

Whether a person paying rent due upon a land which is not a charge upon such land and which he is liable to pay along with others is entitled to a similar charge—*Quære*.

Whether a subsequent mortgagee paying off arrears of revenue acquires a first charge for such payment in preference to the prior mortgages—*Quære*.

The right of contribution secured by S. 82 of the Transfer of Property Act is a 'real right' and not simply a "claim in *personam*."

*Baldeo v. Baij Nath*³ referred to.

(*Dubitante*). The words "several properties of several owners" mean not only separate plots respectively owned by separate owners but also distinct shares severally owned by two or more co-owners as tenants in common with unity of possession.

1. 12 M. L. J. R. 103.

2. 15 M. & W. 444.

3. I. L. R., 13 A. 371.

The lien or charge in favor of the person claiming contribution in respect of payment of revenue does not depend upon the doctrine of subrogation.

The lien under S. 2 of the Rev. Recovery Act is a lien by operation of law in favour of the crown only.

When revenue is assigned to a subject, it ceases to be public revenue and is converted into rent or private property.

A suit for the enforcement of a charge is governed by the 12 years' period provided by Art. 132 of the Limitation Act.

Per Moore, J.

The claim for contribution by the purchaser is not a charge upon the shares of the other co-sharers.

*Seshagiri v. Pichhu*¹ dissented from.

Justice, equity and good conscience are captivating terms and ought not to be resorted to unless consistent with sound general principles and the intention of the legislature.

Appeals from the decrees of the District Court of Vizagapatam in O. S. Nos. 3 and 4 of 1900.

C. Sankaran Nair and T. Rangachariar for appellant.

The Advocate General (Hon. J. E. P. Wallis) and *K. Subramania Sastri* for respondent.

The appeals first came on before *Bhashyam Aiyangar* and *Moore, JJ.*, who made the following Order of Reference* :—

BHASHYAM AIYANGAR, J. :—The Permanently Settled estate of Merangi in the district of Vizagapatam was registered in the Collector's office in the name of one Jagannatha Raz as its sole proprietor. A suit was brought for its partition by three of his co-parceners, including the present defendant, which was unsuccessfully resisted by Jagannatha Raz on the ground that it was an impartible estate. Both the Indian Courts and finally the Judicial Committee of the Privy Council by its decree in 1891, *Sri Raja Satrucharla Jagannadha Razu v. Sri Raja Satrucharla Ramabhadra Razu*², held that the estate was partible and directed its partition into four equal shares.

On the 23rd October 1893, the late Maharajah of Vizianagaram, the testator under whom the plaintiff claims, purchased from Jagannatha Raz his undivided one-fourth share in the estate which purchase became absolute in the events that followed. There was

*29th September 1902.

1. I. L. R., 11 M. 462.

2. I. L. R., 14 M. 237.

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no delivery of possession to the purchaser and on the 5th May 1894, the Collector in execution of the decree of the Privy Council effected a partition of Merangi, dividing it into four estates each separately assessed and registered, and the estate of Chinna Merangi was allotted to Jagannatha Raz's share which, as aforesaid, had been sold to the late Maharajah of Vizianagaram. Out of the purchase money the vendee paid revenue due to Government up to the end of October 1893 in respect of the entire estate which prior to the partition was in the sole possession of Jagannatha Raz. For subsequent arrears of revenue upon the entire estate until the date of partition, viz., the 5th May 1894, the Collector on 5th September 1894 attached the estate of Chinna Merangi only, which at that time was in the possession of Jagannatha Raz, the other three shares having been on the 5th May 1894 delivered respectively to the plaintiffs in the partition suit. The arrears amounting to Rs. 13,273-2-5 for which the attachment was made having accrued upon the whole estate before it was divided and separately registered, it was competent to the Collector to realize such arrears by attachment of the whole or any portion of the estate and he selected Chinna Merangi which had fallen to the share of Jagannatha Raz probably because he thought it was equitable to do so, as Jagannatha Raz continued in possession of the whole estate until the date of partition. Instead of bringing Chinna Merangi to sale, the Collector under the provisions of the Madras Revenue Recovery Act (II of 1864) realized the arrears from the current income by continuing in the management of the estate until the 19th January 1898, when the same was delivered to the plaintiff in execution of the decree in O. S. No. 34 of 1894 which had been brought by the late Maharajah of Vizianagaram against Jagannatha Raz and his sons to enforce the sale deed of 1893 by recovering possession of Chinna Merangi, which in the partition of May 1894 had fallen to the share of Jagannatha Raz, the vendor.

The present suit was brought on the 19th December 1899 to recover from the defendant by way of contribution the sum of Rs. 4,284-6-10, being his one-fourth share of the arrears which had been realized from the income of Chinna Merangi alone and the plaintiff seeks to recover the said amount both personally from the defendant and by enforcing it as a charge upon the defendant's share in the estate.

The defendant pleaded *inter alia* that the suit was barred by limitation under Art. 99 of the second schedule to Act XV of 1877 and also by section 43 of the Code of Civil Procedure and that the plaintiff acquired no charge upon defendant's share in the estate.

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The District Judge dismissed the plaintiff's suit on the ground that the defendant's plea of limitation was well founded as, in his opinion, it was established by Exhibit C that the whole of the arrears for which Chinna Merangi had been attached, was realized before November 1896. He did not specially consider the question as to whether the plaintiff has a charge upon the share of the defendant, evidently because in his opinion Art. 99 would be applicable, not only to the enforcement of the personal obligation, but also to the enforcement of the charge, if any.

The question of limitation alone has been argued before us and the points chiefly relied upon in support of the appeal are :—

- (i) that the plaintiff has by law a charge ;
- (ii) that, if so, in so far as the plaintiff seeks to recover the amount claimed by enforcing the charge, the suit is governed by Art. 132 and not by Art. 99 or any other article ;
- (iii) that even if it should be held that the plaintiff has no charge in so far as the plaintiff seeks to recover the amount personally from the defendant, the suit is governed by Art. 120 and not by Art. 99 ;
- (iv) that even if Art. 99 were applicable, the suit is not barred either in whole or in part, inasmuch as it is clear from Exhibits D and E that a portion of the arrears in question consisting of two items on account of interest, *viz.*, Rs. 364-1-3 and Rs. 781-10-3 were credited to Government from the income of Chinna Merangi on the 11th January 1898, which is within three years of the date of the suit.

It is impossible to decide the preliminary question of limitation without determining the plaintiff's right to claim contribution from the defendant, which forms the subject of the 5th issue, on which the Judge has recorded no finding. If there had been no sale by Jagannatha Raz of his share and the present suit had been brought by Jagannatha Raz himself, it is clear that he could not

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have maintained it. A co-sharer who is in possession of the entire estate and pays the Revenue due to Government upon the estate cannot claim contribution from his co-sharers unless the income derived by him from the estate falls short of the amount of revenue paid to Government (*Dakhina Mohan Roy v. Sarada Mohan Roy*¹); and in any event he can maintain no such suit if he holds and enjoys the entire estate as sole owner of the property to the wrongful exclusion of his co-sharers (*Achut Ramachandra Pai v. Hari Kamti*).² Though the plaintiff claims a fourth of the estate under Jagannatha Raz he cannot be regarded as bringing this suit as the representative in interest of Jagannatha Raz. He became the owner of the one-fourth share on the 23rd October 1893, and the arrears of revenue on the entire estate which was realised by Government from the plaintiff's share only accrued due between the 30th October and the 5th May 1894, when the four shares were divided and separately assessed. During this intervening period the plaintiff, the defendant and two other co-sharers were co-owners or tenants in common of the estate; the estate, however, was not in the possession of any of them; but continued in the exclusive possession of Jagannatha Raz who, in spite of the terms of the sale deed, did not put the late Maharajah of Vizianagaram into possession of certain specified villages, which, until partition of the estates should be effected by the Collector, was to be enjoyed by the vendee in lieu of the undivided one-fourth share conveyed to him by Jagannatha Raz. Jagannatha Raz having thus been in possession of the whole estate until the 5th May, he ought to have paid the arrears of revenue in question from the income of the estate or have otherwise accounted for the income to the four co-sharers.

The arrear of revenue was a charge upon the entire estate and as between the plaintiff, the defendant and the two other sharers, the charge as a burden upon the estate had to be borne equally without prejudice, however, to the right of each co-sharer to hold Jagannatha Raz accountable to him for the mesne profits of his share during the said period. If the Collector had realized the whole amount of the arrears of revenue from the share of the defendant instead of from that of the plaintiff, it is clear that the latter could not successfully resist the defendant's claim

1. I. L. R., 21 C. 142.

2. I. L. R., 11 B., 313 at 319.

for contribution and, if so, it follows that the plaintiff from whose share alone the arrear was realized by the Collector, is equally entitled to claim contribution from the defendant since the plaintiff is not responsible for the wrongful act of Jagannatha Raz in excluding his co-sharers from possession and making default in the payment of revenue due to Government and also because, as already stated, the plaintiff cannot be regarded as bringing this suit as the representative in interest of Jagannatha Raz.

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Whether the plaintiff is equitably estopped from claiming contribution for all or any of the reasons mentioned in paragraphs 5 and 7 of the written statement, forms the subject-matter of the sixth issue, and the Judge has recorded no finding on this issue.

The plea that the suit is barred by S. 43 of the Civil Procedure Code by reason of the plaintiff not having joined this defendant as a party defendant in O. S. No. 34 of 1894 and included this claim also therein, is manifestly untenable (See Judgment in *Gangi v. Ramasami*¹).

The claim for contribution generally arises in cases where the party seeking contribution has himself *paid* the amount in respect of which contribution is sought. In the present case, however, the arrear of revenue was not paid to Government by the plaintiff with his own hand but was realized by the Collector under the Revenue Recovery Act from the income of plaintiff's share after it was registered as a separate estate. In my opinion this makes no difference, either in regard to the plaintiff's right to claim contribution or even as to the application of Art. 99 or 61 of the second schedule to Act XV of 1877, in both of which the person bringing the suit is referred to as having 'paid' the amount sought to be recovered. Bearing in mind that in cases in which the right to contribution exists under law the principle on which it rests is that "both in law and equity contribution is bottomed and fixed on general principles of justice and does not spring from contract * * * * and the reason given in the books is *in equali jure* (the law requires equality). One shall not bear the burden in case of the rest" (*per Lord C. B. Eyre in Swain v. Wall*². See also *Derring v. Earl of Winchelsea*³, also *per Lord Redesdale in Sterling v. Forester*⁴) and that the claim has its

1. 12 M. L. J. R., 103 : S. A. No. 961 of 1900.

2. 1 Ch. Rep. 149.

3. I. L. R. 41.

4. 3 Bligh at P. 590 ; S. C. 22 E. R., at p. 76.

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foundation in the clearest principles of natural justice, for as all are equally bound and are equally relieved, it seems but just that in such a case all should contribute in proportion towards a benefit obtained by all, upon the maxim *Quisentil commodum sentire debet et onus*¹. It is perfectly immaterial whether the party seeking contribution made the payment voluntarily or involuntarily, *i. e.*, whether he made the payment and thus averted any coercive process against his property or without making such payment suffered his property to be seized under process of law for the purpose of the amount being realised from its income or by its sale. In either case, he has been damnified to the extent to which the payment made by him as the amount realised from his property exceeds his share of the liability, as between him and the party or parties from whom he seeks contribution and the latter have been to that extent benefited. I am glad to be fortified in this opinion by the judgment of Pollock, C. B. in *Rodgers v. Maw*². In that case the plaintiff and the defendant were partners and they dissolved the partnership, the plaintiff agreeing to take all the debts of the firm upon himself and to release the defendant from liability and the defendant giving him a bond for a certain sum payable by instalments. The plaintiff failed to pay a debt due from the firm, whereupon the creditors sued the defendant and obtained judgment and issued a *fi. fa.* under which the sheriff seized and sold the defendant's goods, and out of the proceeds paid the debt. In an action by the plaintiff upon the defendant's bond, it was held that the defendant was entitled to set off as *money paid* the sum so paid by the sheriff. Pollock, C. B., in distinguishing the case from *Moore v. Pyrke*³, observed as follows:—"The present case is not precisely the same. Here the defendant's goods were taken not under a distress but under a writ of *fi. fa.* which directs the sheriff to make of the defendant's goods in that action '*so much money*' and the sheriff has so done; he has made money of the defendant's goods and therewith has paid the claim in the action * * * *. We cannot see upon what principle a man may not set off money paid by the produce of his goods as well as money paid indirectly without any sale of his goods." In my opinion the word 'paid' occurring in Arts. 61 and 99 of Act XV of 1877 will, without any undue stretching, include payments made or

1. Story's Equity Jurisprudence, Sec. 493.

2. 15 M. & W., 444.

3. 11 East, 52.

derived either out of the sale proceeds or income of the property of the person seeking contribution, just as under section 20 of the Limitation Act, the receipt by a mortgagee of the produce of land mortgaged to him is a payment made to him by the debtor for the purpose of that section. The learned pleader for the appellant relied on the case of *Fuckaruddeen v. Mohima Chunder*¹ and *Pattabhiramayya v. Ramayya*² in support of his argument that neither Art. 61 nor Art. 99 was applicable to this case, and that therefore the suit is governed by Art. 120 in so far as the personal remedy sought is concerned. In the former case, in execution of a joint decree for money against the plaintiff and defendant, the decree-holder attached the plaintiff's property alone and realised the decree amount by sale of the property. The plaintiff's suit for contribution was resisted on the ground that it was barred by Art. 100 of Act IX of 1871, corresponding to Art. 99 of Act XV of 1877. • *Mitter J.*, dealt with this plea as follows :—"The date from which limitation begins to run is three years from the date of the plaintiff's advance in excess of his own share. In the present case nothing was paid by the plaintiff. Therefore, it is a question whether that article or Art. 118 (corresponding to 120 of Act XV of 1877) applies to this case****. However, without expressing any decided opinion on this point, and assuming that Art. 100 applies, we think that the plaintiff was not bound absolutely by the statement made in his plaint that this cause of action arose on the date of the auction sale. Upon the facts stated in the plaint it is clear that the cause of action in the present suit arose when the sale proceeds were taken out of court by the decree-holder. We think, therefore, that the lower Courts are not right in holding that the plaintiff's claim is barred, without ascertaining the date when the sale proceeds were paid to the decree-holder* * * *. The decree of the lower Courts must be set aside and the case remanded to the Court of first instance for trial." Notwithstanding the expression of a doubt in this judgment as to the applicability of Art. 99 of Act XV of 1877, to a case in which the amount in respect of which contribution is sought was realized by attachment and sale of the property of the person seeking contribution, the case was decided and remanded on the footing that that article governed the case. In the latter case² there was a decree for rent

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1. I. L. R., 4 C. 529.

2. I. L. R., 20 M. 23.

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amounting to Rs. 4,000 and odd against a number of the tenants jointly, but the decree was executed against one of them alone by attaching his property and realising Rs. 2,650 by sale thereof. The share payable by the plaintiff was only Rs. 183, he sued the co-tenants for contribution and they pleaded limitation. It was held on second appeal that Art. 99 was inapplicable because the whole of the amount due under the joint decree was not realized from the plaintiff but only a portion thereof, though such portion was far in excess of his share of the liability. The learned judges who decided that case expressed their concurrence in the view taken by the Calcutta High Court that the three years' period of limitation under Art. 61 should be reckoned not from the date of the sale, but from the date when the sale proceeds were drawn by the decree-holder from court. As to the applicability of Art. 61 they expressed their doubt in the following terms:—"It may be doubted whether Art. 61 is applicable to the present case where, there was no payment by plaintiffs, but where their property was seized and sold by the court and the proceeds paid by the court to the decree-holder." However, as the sale proceeds had been drawn within three years from the date of the suit, and if Art. 61 were inapplicable to the case, Art. 120 which prescribes a period of six years would govern the case, the suit would be in time under either article, and it, therefore, became unnecessary to decide whether or not Art. 61 could be applied. I am unable to share in the doubt expressed in the above two cases as to the applicability of Art. 99 or 61 as the case may be to a case in which the amount was realized by sequestration or sale of the property of the person seeking contribution, and I cannot accede to the contention that assuming that the plaintiff has no charge upon the defendant's share of the estate, the article applicable to the case is Art. 120 and not 61 or 99.

I shall now proceed to consider whether the plaintiff has such a charge and, if so, whether in so far as he seeks to enforce the charge the article applicable is Art. 132, or whether, as contended on behalf of the respondent, the enforcement of the claim both personally against the defendant and against the property charged with the claim is governed by the three years' rule of limitation prescribed by Art. 61 or 99 as the case may be.

The question of charge was mainly argued on both sides with reference to the decisions of the Indian High Courts reported in *Seshagiri v. Pichu*¹, *Achut Ramchandra Pai v. Hari Kamti*², *Kinu Ram Das v. Mozaffer Hoosain Shaha*³, and *Seth Chitor Mal v. Shih Lal*⁴, and the English cases of *Leslie v. French*⁵, *Falke v. Scot. Imp. Insurance Co.*⁶, and *Strutt v. Tippet*⁷, and S. 35 of the Madras Revenue Recovery Act II of 1864 as amended by Madras Act I of 1897.

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The statutory charge recognized or created by S. 35 of Act II of 1864 is inapplicable to the case, at any rate for the reasons that it gives a charge only over the land "which has been or is about to be attached" and which is released or saved therefrom by payment made by the party seeking to be reimbursed either in whole or by way of contribution, while in the present case, it was not the defendant's land, over which the charge is now claimed, that was or was about to be attached, but the land of the plaintiff himself, and that after it had been separated.

The question, therefore, which was chiefly argued was, whether apart from the provisions of S. 35 of the Revenue Recovery Act, the plaintiff has, under the general principles of law, a charge over the defendant's share by reason that it was equally liable with the plaintiff's share to pay the arrear of revenue which accrued due to Government between 31st October 1893 and 5th May 1894.

The principle of law applicable to the case was fully discussed by a Full Bench of the Calcutta High Court in *Kinu Ram Das v. Mozaffar Husain*⁸, and it was held by a majority of three judges against two that a co-sharer who has paid the whole revenue and thus saved the estate, does not by reason of such payment acquire a charge on the share of his defaulting co-sharer. In that case the decision of the same Court in *Syed Enayet Hossein v. Muddeen Mooner Shahoon*⁹, which recognised such charge on the authority of a dictum of the Privy Council in *Nugendrachunder v. Kaminee Dossee*¹⁰ was overruled and the dictum of the Privy Council was explained and distinguished.

1. I. L. R., 11 M. 452.
2. I. L. R., 11 B. 318.
3. I. L. R., 14 C. 809.
4. I. L. R., 809 14 A. 273.

6. 34 Ch. D. 284.
7. 62 L. T. Rep. N. S. 475.
8. I. L. R., 14 C. 809.
9. 14 B. L. R., 155.
10. 11 M. I. A. at p. 258.

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The same question had already come under the consideration of the Bombay High Court in *Achuta Ramachandra v. Hari*¹ and following the decision in 14 B. L. R., 155, the dictum of the Privy Council in *Nugendra Chunder v. Kaminee Dossee*², and some other Calcutta cases, *Ram Dutt Singh v. Horakh Narain Singh*³, *Nobin Chunder Roy v. Rup Lall Doss*, in spite of the doubt expressed in *Kristo Mohinee Dossee v. Kaliprosunno Ghose*⁴, it was there held that payment of assessment by a part owner is a payment made by a person entitled to pay it who does so under circumstances which make it necessary in order to save the estate for himself and co-owners, and "in either view of such payment, he becomes equitably entitled to a charge on the whole estate as against the other co-sharers, and if this be so, the mere circumstance that he has no existing charge on their shares at the time of such payment would appear to be no sufficient reason in equity, justice and good conscience for not allowing him to realize the payment from the shares of his co-owners for their respective quotas." The suit, however, was dismissed as upon the facts it was held that the plaintiff was not entitled to contribution.

In *Seshagiri v. Pichu*⁵ the revenue due on certain lands comprised in a ryotwari patta fell into arrears, and subsequently thereto the plaintiff and defendant No. 4 each bought a portion of the lands. After this the portion in the plaintiff's possession was alone attached for the arrears and he paid the whole amount to prevent a sale and sued to recover the proportionate share of revenue in respect of the portion purchased by the 4th defendant claiming payment of the same as a charge upon such portion. It was held, following the decision of the minority in *Kinu Ram Das v. Mozaffar Hussain*⁶, and dissenting from the view of the majority that the plaintiff was entitled to a decree for contribution against defendant No. 4 and to a charge on the lands in his possession.

The question was also subsequently considered by a Full Bench of the Allahabad High Court in *Seth Chitor Mal v. Shib Lal*⁷, in which the majority (*Mahmood*, J. dissenting) concurred in the Full Bench decision of the Calcutta High Court. Both in the

1. I. L. R., 11 B. 318
2. 11 M. I. A. 258.
3. I. L. R., 6 C. 549.
4. I. L. R., 9 C. 377.

5. I. L. R., 8 C. 402.
6. I. L. R., 11 M. 452.
7. I. L. R., 14 C. 809.
8. I. L. R., 14 A. 273.

Calcutta and Allahabad decisions the provisions of the various enactments in force in those provinces relating to the recovery of arrears of revenue which are much more complicated than the corresponding enactments in force in this Presidency, were critically examined and the English law also fully discussed.

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So far at any rate as this Presidency is concerned, in determining the question now under consideration, I attach no value to the circumstance that S. 35 of the Madras Revenue Recovery Act creates a charge only in favour of a *bona fide* mortgagee or other incumbrancer or any person not being in possession of the estate, but *bona fide* claiming an interest therein adverse to the defaulter, but that no similar provision is made in favour of a co-sharer. Nor am I convinced by the reasoning of *Wilson, J.*, in *Kinnu Ram Das v. Mozaffar Hussain* or of *Edge, C. J.*, in *Seth Chitor Mal. v. Shib Lal*, that it would be contrary to the policy of legislative enactments in those provinces to recognise an equitable charge in favour of a co-sharer, even if such charge should exist under general principles of law. The maxim '*expressio unius est exclusio alterius*' is wholly inapplicable in dealing with questions of this kind with reference to special or local enactments not professing to be a codification of any particular branch of law. On this point I cannot do better than quote the following passage from Maxwell's Interpretation of Statutes (3rd edition at pp. 437—39), which is fully supported by common sense and the authorities therein referred to:—"Provisions sometimes found in statutes enacting imperfectly or for particular cases only that which was already and more widely the law, have occasionally furnished ground for the contention that an intention to alter the general law was to be inferred from the partial or limited enactment; resting on the maxim, *expressio unius est exclusio alterius*. But the maxim is inapplicable in such cases. The only inference which a court can draw from such superfluous provisions (which generally find a place in Acts to meet unfounded objections and idle doubts) is that the Legislature was either ignorant or unmindful of the real state of the law, or that it acted under the influence of excessive caution; and if the law be different from what the Legislature supposed it to be, the implication arising from the statute, it has been said, cannot operate as a negation of its existence, and any legislation founded on such a mistake has not the effect of making that law

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which the Legislature erroneously assumed to be so. Thus, when in contending that debts due by corporate bodies were subject to foreign attachment in the Mayor's Court, the express statutory exemptions of the East India Company and of the Bank of England were relied upon as supplying the inference that corporate bodies were deemed by the Legislature to be subject to that process, the judicial answer was that it was more reasonable to hold that the two great corporations prevailed on Parliament to prevent all question as to themselves by direct enactment, than to hold that Parliament by such special enactment meant to determine the question in all other cases adversely to corporations. A Local Act which, in imposing wharfage dues for the maintenance of a harbour on certain articles, expressly exempted the crown from liability in respect of coals imported for the use of royal packets ; and the provisions in turnpike Acts which exempted from toll carriages and horses attending the queen, as going or returning from such attendance were not suffered to affect the more extensive exemptions which the Crown enjoys by virtue of its prerogative. The will of the Legislature as expressed in a statute is of course supreme and to the extent to which rights have been created as declared by a statute they must take effect whether the same be consistent or inconsistent with the common law of the land or with notions of justice, equity and good conscience and in either case, whether the Legislature was aware or was ignorant of the common or equity law. An instance is afforded by section 35 of Madras Act II of 1864, which gives a charge in favour of the mortgagee of the land for payment of revenue made by him which charge, however, is to take priority over other charges, only according to the date at which such payment was made, though under general law such payment will take priority according to the date of his mortgage. The Legislature has thus though probably unconsciously and apparently in ignorance of his rights under the general law deprived him of the priority which he would otherwise have had.

As far as there is any indication by the Legislature of its policy, if any, in the matter, I may refer to section 31, cl. 4 of Madras Act IV of 1897 which runs as follows:—"A co-owner or a person who in good faith deems himself to be owner or co-owner making such payment shall acquire a charge on such estate

or Government land for the amount so paid by him with interest thereon at the rate of 9 o/o per annum ; provided that in the case of a co-owner such charge shall extend only to so much of the amount paid as is due in respect of the shares of the other co-owners in such estate or Government land." The payment here referred to is payment of public revenue on account of expenses of survey and demarcation. And if in determining whether or not it is just and equitable that a co-owner should have such a charge in the matter of the payment of public revenue, it is legitimate to import the element of public policy, I may add that the existence of such a charge in favour of a co-owner will, by giving him greater security for the realization of the contribution due to him from the defaulting co-owner, indirectly strengthen the security which the Crown possesses under the law for collection of land revenue.

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The question having been fully discussed *pro* and *con* in the leading Indian cases above referred to, I am relieved from the necessity of travelling over more or less the same ground and shall content myself with stating my own reasons for adopting the conclusion arrived at in the Madras and Bombay cases and by the dissenting Judges in the Calcutta and Allahabad Full Bench cases in so far as such conclusion involves the proposition which is all that arises in the present case that where one of two or more co-sharers in a revenue-paying estate pays the whole revenue in order to save and so does save the estate, he is entitled to a charge upon the share of each of his co-sharers to the extent of the latter's share of the revenue.

The true principle applicable to the case has been well pointed out by *Kernan, J.* in the following terms in *Seshagiri v. Pichu*¹ "The lands of defendant No. 4 and of the plaintiff are both liable to a common burden, neither of them can get his land free from the claim for the revenue without paying the amount due on the whole lands. It would be against equity and good conscience that the common burden should be thrown exclusively on either lot of land or on either of the parties. I wish to add that *Harbert's case* is an authority that in case of persons liable to payment of a common burden affecting their lands the lands of one alone shall not be liable. In that case it is said 'when two or more are bound

1. I. L. R., 11 M. 452 at 454.

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on a recognisance or statute, each is bound in the whole, yet the land of one only shall not be extended.' Further it is said 'so it appears by those cases that when land shall be charged by any lien the charge ought to be equal and one alone should not bear all the burden, and the law on this point is grounded in great equity.' Under S. 2 of Madras Act II of 1864, it is expressly declared that 'the land, the buildings upon it and its products shall be regarded as the security for the public revenue' due on the land and taking that along with S. 42, it is clear that public revenue forms the first charge upon the land, i. e., upon the whole and every portion of the estate.

From the Full Bench decisions of the Calcutta and Allahabad High Courts I gather that there are sections corresponding to S. 42 in the Revenue Law in force in those provinces, but whether there is an express section corresponding to S. 2 of the Madras Act, I am not aware. It appears to me that sufficient attention was not paid in those cases to the fact that the amount in respect of which contribution was sought by one co-owner against another, formed by law a charge upon the lands belonging to the co-owners. This element, in my opinion, materially simplifies the determination of the question and distinguishes the case from the decision of a single Judge reported in *Thanikachella v. Shudachella*¹. In this latter case one of two joint farmers of a mittah paid the whole of the rent due to the mittahdar and brought a suit for contribution against the co-farmer, and it was held that by reason of such payment he acquired no charge upon the share of the co-farmer in the leasehold and that the suit was therefore barred by limitation having been brought more than three years after the date of payment. Mr. Justice *Parker* distinguished it from *Seshagiri v. Pichu*² really on the ground that the amount in respect of which contribution was sought was not public revenue under the Revenue Recovery Act but only rent under Madras Act VIII of 1865. Under the law in force in this Presidency rent due to a proprietor unlike revenue due to Government forms no charge upon the holding. According to the view taken in the Calcutta and Allahabad Full Bench cases by the dissentient Judges, even in such a case the party seeking contribution would have a charge on the principle of salvage. It is, however,

1. I. L. R., 15 M. 298.

2. I. L. R., 11 M. 452.

unnecessary to consider in this case whether such view is sound or not. The learned Chief Justice in the Allahabad case concludes his judgment as follows :—(pp. 299 and 300) “ Justice, equity and good conscience are captivating terms ; but before a Judge applies what may appear to him at first sight to be in accordance with justice, equity and good conscience, he must be careful to see that his views are based on sound general principles, and are not in conflict with the intentions of the Legislature or with sound principles recognised by authority. In my opinion justice, equity and good conscience do not require us in India to go so far afield as the Irish Courts, in order there to seek for, and thence to import into India, novel principles of equity based on unsound analogy, and rejected as unsound by Judges of such authority as *Bowen and Fry*, L. JJ., and not followed by such an authority as the late Lord Justice *Cotton* in *Falcke v. Scottish Imperial Insurance Co.*’ and which further are at variance with the Transfer of Property Act, 1882, of the Indian Legislature, and with the policy of the Government as disclosed in its legislative enactments.”

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No doubt as held by the House of Lords in the recent case of *Buabon Steamship Company v. The London Assurance*¹, there is no general principle of law that where one person gets some advantage from the act of another, a right of contribution towards the expense for that act arises on behalf of the person who has done it. In that very case in which the right of contribution was negatived, the Lord Chancellor put it on the ground that in that case there was no debt for which both the parties were bound to some third person on a common obligation binding both parties to equality of payment or sacrifice in respect of such obligation. But when once the right of contribution is established, as in the present case, it certainly cannot be an inequitable or violent stretch of such right to make it a charge against the co-owner's share at any rate in certain classes of cases and as against him. In the Allahabad Full Bench case the contention was that the charge should prevail as against a prior mortgagee and in fact against a purchaser in execution of a decree founded on such prior mortgage ; and I suspect that the judgment of the Chief Justice is principally directed to negativing the claim of priority of charge.

1. 34 Ch. D. 224.

2. (1900 A. C. 6).

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As between competitors for priority of charge I am inclined to think that unless the parties who are immediately concerned do not make the necessary payment though an appeal is made to them for the purpose, a later incumbrancer who makes the payment can acquire no priority of charge in respect of such payment, but that a person occupying the position of a part owner is under no obligation to communicate with mortgagees and that if the payment be made by him honestly and *bona fide* and not by the mortgagee, to save the estate from being sold for arrears of revenue he will acquire a priority of charge over such mortgagee as held in the dissenting judgment of *Mahmood, J.* I refrain, however, from expressing any decided opinion on this point, as no such question of priority arises in the present suit and all that has to be decided in this appeal is whether the plaintiff has, as against the defendant and any one claiming under him since the date of payment, a charge against his share in the estate.

If 'justice, equity and good conscience do require us in India to go so far afield' as the English courts 'in order there to seek for and thence to import into India principles of equity,' we can certainly be pardoned 'to go so far afield as the Irish courts' for the same purpose. We in India are not absolutely bound by the decisions of either set of courts, as we are by the decisions of the Judicial Committee of the Privy Council; but without resorting to the decisions of the Irish courts, I say with all deference, that the lien contended for in the present case is not importing into India any novel principle of equity based on unsound analogy and rejected as unsound by judges of such eminence as Bowen and Fry, L. JJ. and not followed by an equally eminent judge as the late Lord Justice Cotton in *Falcke v. Scot Imp. Insurance Co.*; nor is it at all at variance with the Transfer of Property Act of the Indian Legislature and with the policy of the Government as disclosed in its legislative enactments, at any rate, such of them as are in force in this Presidency.

The English cases relating to liens for expenditure upon the property of another are collected by Fisher in his work on Mortgages (5th edition) in paragraphs 520, 530, and there is an admirable summary and critical review of the English and Indian Law on the subject by Dr. Rash Behari Ghose in his valuable treatise

on Mortgages (3rd edition, pp. 150—175). A reference to these will show that there is nothing novel in the lien contended for in the present case. As regards the two English cases principally relied upon in the Calcutta and Allahabad Full Bench cases, as negating the lien, I venture to state, with all deference, that neither of those cases is an authority for the position that a part owner acquires no lien upon the property of his co-owner, when the common debt which the former discharged was itself a charge and burden equally upon the share of both. In *In re Leslie*¹, Fry, L. J., in dealing with the payment of premiums on a policy of life insurance by a stranger or part owner, formulated that a lien may be created upon the moneys secured by a policy, by payment of premiums in the following cases (P. 560):—

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“*First*—By contract with a beneficial owner of the policy ;

Secondly—By reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation ;

Thirdly—By subrogation to this right of trustees of some person who may at their request have advanced money for the preservation of the property.

Fourthly.—By reason of the right vested in mortgagees, or other persons having a charge upon the policy, to add to their charge any moneys which have been paid by them to preserve the property.”

Later on (at p. 561) he added that except in the above four cases no lien is created by the payment of premiums by a mere stranger or part owner. It will be observed that Fry, L. J., made such positive statement only with reference to the payment of premiums on a policy of insurance. But I very much doubt whether even in regard to that class of cases Fry, L. J., was sufficiently guarded in making such a sweeping and positive statement. In *Strutt v. Tippet*², Lindley, L. J., in dealing with payments by a stranger, of premiums on a life policy, referred as follows to such statement of the law by Fry, L. J., (at p. 477) :—“I have come to the conclusion that, upon the documents, any right to a lien was excluded by the terms. Apart from that I have some

1. 23 Ch. D. 582.

2. 62 L. T. (N. S.) p. 475.

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doubt if there would not be a lien. I am too cautious to indulge in general propositions, and I am doubtful if the propositions in *In re Leslie, Leslie v. French* (*ubi sup*) are exhaustive. Fry, L. J., there, after enumerating cases in which a lien is created, says: 'I am further of opinion that, except under the circumstances to which I have referred, no lien is created by the payment of the premiums by a mere stranger or by a part owner.' In this case the plaintiffs are mere strangers. I do not, however, regard the plaintiff's claim to a lien as necessarily excluded by the proposition in *In re Leslie, Leslie v. French*. If an owner of onerous property agrees with me to indemnify me or my property from the burdens on the onerous property which may fall on me or my property, and the owner makes default, and I or my property have to bear those burdens, I am inclined to think that I should have, as against the owner of the onerous property, a lien on it for the money expended by me in bearing that burden which as between him and me he ought to bear. I should, in the case supposed, have preserved the onerous property for him under circumstances which entitled me to it at his expense, and I do not think that in such a case my sole remedy is by an action for damages against him; the existence of such personal remedy would not, I think, exclude such lien. I am not aware of any decision inconsistent with this view, and the principles on which many cases of equitable lien depend seem to me to support a lien in such a case.'

The above remarks of Lindley, L. J., which were made with reference to payments made by a stranger, will apply with greater force to payments made by a part owner. In *In re Leslie*, Fry, L. J., admits that it is well established that if a tenant for life renews leaseholds and dies before the expiration of the renewed term, his estate is entitled to a lien on the interests in remainder proportionate to the unexpired portion of the renewed term. But he distinguishes the same from the case before him on the ground that the equities governing the relation of tenant for life and remainderman are peculiar, conceding that the case before him was not analogous to the relation of tenant for life and remainderman; certainly the equities governing the relation of co-owners of an estate subject to an indivisible assessment payable to Government under the stringent rules of the revenue law in force in India and in the interests of the public, realisable summarily under the

drastic measures of such law, are even more peculiar than those between a tenant for life and remainderman.

In *Falcke v. Scot. Imp. Insurance Co.*,¹ the Court of Appeal held that payment of premiums on a policy of Life Insurance by the assured in his character of owner of the equity of redemption could not give him a lien in priority to the mortgage debt, and that the fact that the policy has been preserved by such payment did not give him a right to have the premiums repaid nor give him lien on the policy for it, and an opinion was expressed that the maritime doctrine of salvage had no application to the payment of premiums on a policy. Cotton, L. J., in the course of his judgment stated that if there had been circumstances leading to the conclusion that there was a request by the mortgagee of the policy that the premium should be paid by the mortgagor, then there would be a claim against the mortgagee or his representative for the money and that he would not say that there might not be a lien on the policy. Bowen, L. J., lays down as follows the principles of law applicable to the case before him, pointing out the distinction between the maritime law of salvage and the right claimed in that case:—(34 Ch. D., pp. 248—9) “The general principle is beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will. “There is an exception to this proposition in the maritime law. I mention it because the word ‘salvage’ has been used from time to time throughout the argument, and some analogy is sought to be established between salvage and the right claimed by the respondents. With regard to salvage and contribution, the maritime law differs from the common law. It has been so from the time of the Roman law documents. The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils and the fact that the thing saved was saved under great

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1. 34 Ch. D. 234.

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distress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea." Fry, L. J., expressed himself as follows as to the application of the doctrine of salvage to cases not connected with the perils of the sea (P. 254):—"I would make only one other observation. We have heard a great deal on both sides of what has been called the doctrine of salvage. I, like Vice-Chancellor Kindersley, exceedingly doubt whether that word can with any propriety be applied to cases of this description. With regard to salvage in the case of ships and maritime perils we know its meaning. It appears that the expression "salvage moneys" as we are informed by one of the learned counsel for the appellant, and I daresay he is quite right, first occurs in the report of the case of *In re Tharp* which was before Lord St. Lenards in 1852, where he seems to have used the expression as one familiar to the Irish Courts in certain cases. I certainly wish that the expression had remained on the other side of the channel where it seems to have arisen. I doubt whether any doctrine which is expressed by the word 'salvage' applies to cases of this description." The learned Chief Justice in the Allahabad High Court evidently refers to the above observations of Bowen and Fry, L. JJ., when he says that "the doctrine, which apparently had its origin in the courts in Ireland that a charge upon land may arise on the principle of maritime civil salvage has been satisfactorily exploded as a principle of equity" (P. 298).

Notwithstanding the supposed 'recent protest' by two eminent English Judges as to the use of the expression 'salvage lien' to cases other than 'Maritime Civil Salvage', Lord Macnaghten in delivering the Judgment of their Lordships of the Privy Council in a later case, *Dakshina Mohun v. Saroda Mohun*¹, referred to the claim of a person, to be repaid, by the proprietor whose title was established under the final decree in the case, the amount spent by him in paying the Government revenue of the land while he was in possession under the decree of the original court subsequently reversed on appeal, as being 'in the nature of salvage.'

As regards the objection that the upholding of the lien in question is at variance with the policy of the Government as

1. I. L. R., 21 C. 142.

disclosed in its Legislative enactments, I have already stated that even assuming it to be so, so far as the Upper and Lower Provinces of Bengal are concerned—though I am by no means convinced that it is so, it certainly is not at variance with the corresponding enactments in force in this Presidency. The learned Chief Justice (in the Allahabad case) further states that such lien is also at variance with the Transfer of Property Act. If this were really so, there would certainly be an end of the matter, and no one could seriously support the lien. With all respect I must say that the very reverse is the conclusion to be drawn from the provisions of the Transfer of Property Act. The appeal has not been argued, as it ought to have been with reference to S. 82 and 100 of the Transfer of Property Act. These two sections throw a flood of light on the question under consideration if they are not decisive of the same in favour of the appellant's position. So far as it bears on the present question, S. 82 provides that where several properties of several owners are mortgaged to secure one debt, such properties are in the absence of a contract to the contrary liable to contribute rateably to the debt secured by the mortgage. This is simply a reproduction of the English Law as laid down in Fisher's Law of Mortgages (5th Edition, paragraph 1347, at p. 644). Section 100 after defining what a 'charge on immoveable property' is, extends the provisions contained in the preceding sections as to a mortgagor, to the owner of the property subject to the charge. The right of contribution secured by S. 82 is only a real right by way of charge on the several properties which were subject to the mortgage and not a claim '*in personam*' (*Baldeo v. Baij Nath*¹) and the charge thus created is made subject to any incumbrance to which the property was already subject at the date of the mortgage. And this right of contribution is extended by S. 100 to properties subject to a 'charge' whether such charge be created by act of parties or by operation of law. By virtue of S. 2 of the Madras Revenue Recovery Act the land is made security for the payment of revenue due thereon to Government, and thus by operation of law the crown has a charge on the entire land for the revenue due thereon. The direct application of Ss. 82 and 100 of the Transfer of Property Act, to the ques-

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1. I. L. R., 13 A. 371.

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tion arising in this case depends upon the right interpretation of the phrase '*several* properties of *several* owners' occurring in S. 82. Does it denote only separate plots respectively owned by separate owners in severalty or also distinct shares severally owned by two or more co-owners as tenants in common with unity of possession? On principle it is difficult to suggest any distinction between the two in this respect. If the wider interpretation of the expression be the correct one, the present question will be directly governed by the terms of S. 82 and 100. The question of interpretation not having, as far as I am aware, been judicially considered in any case and not having been argued before us in the present case, I refrain from expressing any decided opinion on the point either way. In *Danappa v. Yamnappa*¹ recently decided by the Bombay High Court, in which on a mortgage executed by several members of an undivided family, a suit was brought against them after they had become divided and a decree for sale obtained; it was assumed that one of the brothers who discharged the decree debt acquired under section 82 a charge upon the share of his divided brother in the mortgaged property and that such charge passed to a vendee under the brother who so discharged the debt along with his own share in the mortgaged property.

Even if the expression in question cannot grammatically apply to properties not owned separately or in severalty but as co-owners with unity of possession, the principle of the section which is borrowed from the English Law is equally applicable to the present case in which the property belonged in undivided several shares to four co-owners as tenants in common, subject to a common burden or charge for revenue due to Government, the whole of which was realized from the plaintiff's share.

I may also advert to S. 95 (of the Transfer of Property Act) also based upon the English Law which provides for an analogous charge in favour of one of several mortgagors redeeming the mortgage, on the share of each of the other co-mortgagors. But such charge being restricted to cases in which the redeeming mortgagor obtains possession of the mortgaged property, that section does not bear so directly upon the present questions as do Ss. 82 and 100. I do not, however, rest my decision on

1. I. L. R., 26 B. 379.

the doctrine of subrogation, on which apparently *Muthusamy Aiyar*, J. based his decision in *Seshagiri v. Pichu*¹ on the authority of *Gokul Doss Gopal Doss v. Ramlu Seochand*², which in my opinion is inapplicable to the case and proceeds altogether upon a different principle. Whether the prerogative first charge in favour of the Crown as security for the public revenue is one that rests upon the common law of the land, which is simply reproduced in S. 2 of the Madras Revenue Recovery Act or it is one created by statute, is immaterial. In either case, it is a charge by operation of law in favour of the Crown only and ceases when the revenue upon the land ceases to be public revenue and is converted by assignment in favour of a subject, into rent or private property. The charge upon the land therefore cannot run with the revenue and accompany its assignment in favour of the subject. The lien in question rests upon an equitable doctrine which also underlies S. 82 and 100 of the Transfer of Property Act, if not in terms covered by it, and does not rest upon the doctrine of subrogation.

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This equitable doctrine was fully recognized in the following dictum of their Lordships of Judicial Committee in *Nugendra-chunder Ghose v. Kaminee Dossee*³, "considering that the payment of the revenue by the mortgagee will prevent the Taluk from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the Taluk as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the Taluk as against all persons interested therein for the amount of the money so paid. But their Lordships are of opinion that this is not the form in which the question comes before them, and that what they have to decide is not whether such a charge originally existed, or whether it does now subsist, but whether the appellants can enforce such a charge in the present suit." I fully concur in the view taken by the dissenting Judges in the Calcutta and Allahabad Full Bench cases and also by Sargent, C. J., in the 11 Bombay case that this dictum was not intended by their Lordships to be applied only to a mortgagee who prior to the payment of revenue

1. I. L. R., 11 M. 452. 2. L. R. 11 I. A. 133. 3. 11, M. I. A 241 at 258-259.

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by him had a charge upon the land as mortgagee, but that the principle indicated by the dictum is that any person who had such an interest in the land as entitled him to pay the revenue due to Government, and did actually pay it, was thereby entitled to a charge on the land, as against all persons interested therein, for the amount of the money so paid, certainly a co-sharer has at least such an interest in the land liable to be sold for realization of the public revenue, as a mortgagee of the land has, and is as much entitled as a mortgagee to pay the revenue due to the Government and thus save the land from being sold.

If, as in India, there be in England landed property held by two or more co-sharers, subject to the payment of an indivisible revenue to the crown, which revenue, by operation of law, forms first charge upon the land, and one of them alone pays such revenue and saves the estate from liability to be sold by the crown, I have little doubt that without calling in aid the principle of maritime civil salvage or the decision of the Irish Courts, such person will be able to establish his lien or charge on the shares of his co-sharers on the authority of several cases in the Chancery courts and of the English equitable doctrine adopted in S. 82 of the Transfer of Property Act, and I see nothing in the Judgments of Fry, Bowen and Cotton. L. JJ., in *Leslie v. French* and *Falcke v. Scot Imp. Insurance, Co.*, to lead one to the conclusion that those eminent Judges would take a contrary view and question his right to such lien or charge.

If the contention of a co-sharer were that the right of contribution against him could be enforced only against his share in the property which was saved from sale or destruction and not personally against him, there would be more equity in such position and more authority to support it. Freeman in his work on "Cotenancy and partition" states the law, at any rate, as it obtains in America, as follows (paragraph 176) :—"One of the acts that either part-owner may do, without special authority from the others, is to redeem the whole property from a prior sale made in *solido* for the gross amount of taxes due thereon. While the other co-tenants may participate in the benefit of the redemption, the act of their companion is not binding on them so far as to impose upon them

a personal obligation to reimburse him for their proportion of the amount necessarily expended in effecting the redemption. The amount thus expended may, no doubt, be asserted as a lien, against the joint property. But beyond this, the co-tenant has no means of enforcing contribution; because the other co-tenants had the right to abandon their interest in the lands, and to forfeit all claims to it, by non-payment of the tax liens against it." And again (paragraph 263) :—"The purchase of an outstanding title, the removal of a tax or other lien or incumbrance, and the payment of a sum of money for the preservation of the common property, or for the protection or assertion of some common right or the redress of some common injury are all spoken of, in general terms, as affording a ground for contribution in favour of one co-tenant and against another. In no instance, however, have we found that either of these matters has been successfully employed as an affirmative cause of action on which to base a personal Judgment against a non-contributing co-tenant, in the absence of a previous authorization or a subsequent ratification of the transaction out of which the claim for reimbursement arose * * * . If instead of purchasing some title, he has discharged a valid lien or other claim against the property, he may assert such claim or lien to the extent of compelling an equitable contribution * * * But we think all claims by one co-tenant against another arising out of the common property, and disconnected alike from any agreement between the parties, and from any circumstances which clearly establish that one must necessarily have been authorized to act for the other, must, in their assertion, be limited to the declaration and enforcement of a lien against the property. If a different rule prevailed, every part-owner would constantly incur the hazard of being required to pay, for the removal of incumbrances, sums in excess of the value of the estate." It is, however, not contended on behalf of the respondent in the present case, that, if the plaintiff is entitled to claim contribution, the defendant is not personally liable therefor and that he is entitled only to enforce the charge upon the property. So far as revenue due to Government is concerned, in addition to its forming the first charge on the land, the several co-sharers of the estate are also jointly and severally under a personal obligation to Government to pay the revenue and having regard to the various decisions of the courts in this very

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class of cases and analogous cases, all of which fall under Ss. 69, and 70 of the Indian Contract Act, no such contention can now successfully raised. It may also be mentioned that, under S. 35 of the Madras Revenue Recovery Act, the mortgagee or other incumbrancer upon the estate who pays the Government revenue, not only acquires a charge upon the land which was saved by such payment but can also recover the same as a debt from the defaulter.

The point next to be considered is whether the plaintiff is entitled to the benefit of the twelve years' period of limitation provided by Art. 132 of Act XV of 1877 to enforce his charge. It is contended on behalf of the respondent that as Art. 99, which prescribes only a period of three years, specially provides for a suit for contribution by a sharer in a joint estate who has paid the revenue due from himself and his co-sharers, that alone should be applied, even to the enforcement of the plaintiff's charge upon the defendants' share in the estate, if he has such charge, and not the general Art. 132 relating to enforcement of payment of money charged upon immoveable property. The decision of this court in *Natesan Chetti v. Sundarajaiyengar*¹ has no analogy to the present case. That turned upon the construction of Art. 111 which provides a period of three years for a suit by a vendor of immoveable property to enforce his lien for unpaid purchase money. It will be observed that the suit for which a three years' period is prescribed by Art. 111 is specifically a suit to enforce the vendor's charge for unpaid purchase money, and it was held, dissenting from a decision of the Bombay High Court, that Art. 132 cannot be applied to such a suit. That decision would have been in point of Art. 99 like Art. 111 had described the contribution suit as one by a sharer to enforce his lien or charge upon the shares of his co-sharers. Whatever doubt might have existed at one time as to the scope and right construction of Art. 132 of Act XV of 1877 and upon the wording of the corresponding article in Act IX of 1871, (see *Lallubhai v. Naram*², *Davani Ammal v. Ratnachetti*³, *Raghubardayal v. Lachminshankar*⁴, *Shib Lal v. Ganga Prasad*⁵, *Muhammad Zaki v. Chatku*⁶, it has now been definitively settled by the decision of the Privy

1. I. L. R., 21 M. 141.

3. I. L. R., 6 M. 417

5. I. L. R., 6 A. 556.

2. I. L. R., 6 B. 719.

4. I. L. R., 5 A. 461.

6. I. L. R., 7 A. 120.

Council in *Ramlin v. Kalka Prasad*¹, which no doubt is in apparent conflict with the decision of the Court of Appeal in *Sutton v. Sutton*² upon the corresponding section of the English statute of limitations (37 and 38 Vic. C. 57, sec. 8), that the personal liability upon an instrument charging a debt upon immoveable property must be enforced within three or six years according as the instrument is unregistered or registered, and that the claim to realize the money by sale of the property upon which it is charged is governed by the 12 years' period of limitation under Art. 132. *Miller v. Runga Nath Mullick*³, *Khemji Bhagvandas Gujar v. Rama*⁴, *Seshayya v. Annamma*⁵, and *Rathanasami v. Subramanya*⁶. The principle of the said decision of the Privy Council is that, according to the general scheme of the second schedule to the Indian Limitation Act, which in this matter differs from the scheme of the English statutes of Limitation in respect of one and the same suit, the period of limitation varies according as the remedy is 'real' or 'personal,' and this can be illustrated by referring to several articles. Thus Art. 81 prescribes a period of three years for a suit by a surety against the principal debtor. It cannot be contended that if the surety seeks to enforce in such a suit a security by way of charge on immoveable property which the creditor had against the principal debtor, and which under S. 141 of the Indian Contract Act enures to the benefit of the surety, the period of limitation will only be three years for that remedy, and not the twelve years prescribed by Art. 132. The same remark will apply to a suit apparently falling under Art. 83 or 110 when the contract of indemnity sued upon or the arrear of rent sued for is secured by a charge on immoveable property. Similarly in the case of Arts. 115, 116 and others which may be pointed out. Likewise in the case of a suit for contribution by a sharer who is entitled to enforce the same personally against a co-sharer and also as a charge by operation of law against the share of the co-sharer, the former remedy will be governed by Art. 61 or 99 as the case may be, and the latter remedy by Art 132. It has been expressly decided or assumed in more cases than one that a suit to enforce a charge for share of Government revenue against the estate of a co-sharer is governed

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1. I. L. R., 7 A. 502.

2. 22 Ch. 511.

3. I. L. R., 12 C. 389 at 395.

4. I. L. R., 10 B. 516 at 525.

5. I. L. R., 10 M. 100.

6. I. L. R., 11 M. 56.

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by Art. 132 and not by Art. 99 or 120. *Ram Dutt Singh v. Horakh Narain Singh*¹, and *Ibn Husain v. Ramdai*², and *Thanikachella Shudachella*³.

The only remaining point for consideration in connection with the question of limitation is whether the personal remedy against the defendant is either in whole or in part barred by the law of limitation. If neither Art. 99 nor 61 were applicable to the suit, it will no doubt follow that the plaintiff will have the benefit of the general Art. 120 prescribing a period of 6 years, and in that case it is clear that the claim is not barred at all. The only ground urged against the applicability of Art. 61 or 99 is that the word "paid" occurring therein cannot include an involuntary payment by sequestration of the plaintiff's property and receipt by the Crown of the income therefrom in liquidation of the arrears of revenue. For the reasons already given I am unable to accede to this contention. The question, however, as to whether the case is governed by Art. 61 or by Art. 99 presents no small difficulty and I confess that it is perplexing. If the Judge's finding that the whole amount of arrears was or must have been realised before November 1896 can be sustained, the personal remedy will be wholly barred whether Art. 61 or 99 is applied. But it is pointed out on the strength of certain entries in Exhibits D and E that a portion of the arrear being interest on the principal amount of arrears of revenue was received and credited only within three years before date of suit and that therefore the personal remedy is not barred at all or at any rate, as to such portion of the amount. If the entry in the first column of Art. 99 is strictly and literally construed as relating to a suit for contribution which can only be brought after the whole revenue had been paid, as was assumed in *Pattabhiramayya v. Ramayya*⁴, the starting point for computing the limitation for the suit would be the time when the plaintiff made payment in excess of his share, which admittedly was long before 3 years, and in this view the suit would be wholly barred under Art. 99 though a portion of such payment may have been made within three years. Such strictly grammatical and literal interpretation of Art. 99 however leads to

1. I. L. R., 6 Cal. 549.

2. I. L. R., 12 All. 110.

3. I. L. R., 15 M. 258.

4. I. L. R., 20 M. 23.

anomalous if not absurd consequences. In that view there being only one starting point of limitation the claim would be either wholly barred or not at all. If the bulk of his payment in excess of his share had taken place, either once for all or on different occasions, long before three years, and the remaining fragment of the entire amount is paid within three years, is it to be held that the suit is not barred at all under Art. 99? On the contrary if only a trivial amount in excess of his share had been paid more than three years before date of suit, but the remaining amount which forms the bulk of the payment is paid either once for all or on different occasions, all within three years before date of suit, is it to be held that the whole claim is barred by limitation? Under the general law the party seeking contribution has a cause of action to enforce contribution at any rate as a personal obligation, as soon as he has made any payment in excess of his share and he need not wait till he makes the whole payment, if he means or is able to do so. *Davies v. Humphreys*¹. In fact he may be unable to pay the whole amount of revenue, and only a portion thereof in excess of his share may have been paid by or collected from him. It certainly cannot be contended that he will have no right to claim contribution in respect of such excess whether it falls short of making up the entire sum by an insignificant amount or by a considerable amount. Under the general law, therefore, each time that an amount is paid by or levied from him in excess of his share, he has a right of suit for contribution in respect of such payment and when he brings the suit after making several such payments, he really unites several causes of action in one and the same suit under S. 45, C. P. C., and the Law of Limitation under Art. 99 will apply separately to each of such causes of action from the date of the respective payments and the claim for contribution in respect of such payments as were made more than 3 years before date of suit would be barred by limitation. The suit for contribution could be brought either before or after the whole amount of revenue had been paid (*Davies v. Humphreys*), but under section 43, C. P. C., the plaintiff will have to include in the suit the whole of his claim for contribution in respect of all the payments made by him prior to the date of the suit. If the suit contemplated by Art. 99 were one in which the cause of action or right of suit arises

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1. 6 M. & W. 153.

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only if and when the whole amount has been paid, the legislature surely would have provided in the third column that the starting point for limitation was the completion of such payment and not the time when payment was made in excess of his share which may have been long before such completion. There is, however, no authority under general law for the position that a suit for contribution by a sharer against his co-sharer can only be brought if and when he has paid the whole of the revenue due to Government upon the estate and it is extremely unlikely that the legislature would provide limitation for a suit unknown to the law. For these reasons I am strongly inclined to depart from the strictly literal and grammatical interpretation of Art. 99 and read it as if between the words 'has paid' and 'the whole amount' in the two places in which they occur, the words "on account of" were inserted and thus avoid the repugnance and absurdity that would otherwise result (Hardcastle on Interpretation of Statutory and Constitutional Law, 2nd Edition, pp. 99, 109, also per White, C. J., in *Sankara Narayana Vadhyar v. Sankara Narayana Iyer*¹). Reading it in this manner the whole article becomes perfectly intelligible, and whether the suit is brought before or after the whole amount has been paid it will be barred in respect of such payments, if any, as were made more than three years before date of suit and not barred in respect of those made within three years.

It is not clear to my mind that the present case is strictly governed by Art. 99 and not by Art. 61. The latter is the general article applicable to suits for money payable to the plaintiff for money paid for the defendant and Art. 79, 81, 82, 99, 100 and 107 are articles applicable to certain special kinds of suits comprised in the general class described in Art. 61. Having regard to the first portion of Art. 99 which relates to a suit for contribution by a joint judgment-debtor, the latter portion relating to co-shares of a joint estate probably refers to that definite class of joint estates which are registered in the Collector's office in the names of two or more co-sharers. If that be the right construction of Art. 99, the present case will fall under Art. 61, for during the period in respect of which the arrears in question accrued, the estate was registered solely in the name of Jagannatha Raz, and not in the

1. I. L. R., 25 M. 343 at p. 343.

names of the plaintiff, the defendant, and the two other co-sharers or any of them. And under this article also the plaintiff's claim will be barred in respect of payments made more than three years prior to date of suit. The result, therefore, will be the same whether in respect of the personal remedy the suit is governed by Art. 61 or by Art. 99 as interpreted above.

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Before finally disposing of the appeal, the District Judge should be called upon to return within two months, his findings on the 4th, 6th and 7th issues in the case and also to try and return his finding on the following issue. (Whether any and what sums were credited by the Collector within three years before the date of this suit towards the arrear of revenue in question from the income of the plaintiff's estate during the time that it was under the management of the Collector under the provisions of Madras Act II of 1864 and whether any and what amounts were so credited more than three years before date of this suit but subsequent to the death of the late Maharajah of Vizianagaram). The date of the death of the late Maharajah of Vizianagaram does not appear from the pleadings in the case. In respect of payments, if any, made subsequent to his death, the plaintiff will have the benefit of S. 7 of the Indian Limitation Act, though such payments were made more than three years before date of suit. Parties will be at liberty to adduce fresh evidence on the new issue, and such additional evidence as the judge may think fit to permit on the three other issues above referred to.

Since writing the above I have had the advantage of reading the recent decision of the Bombay High Court in *Shivarao v. Pundlik*¹ which appeared in the June part of the I. L. R. Bombay series. The Division Bench (Jenkins, C. J. and Crowe, J.) which heard that case dissents from the dictum of Sir Charles Sargent in *Achuta Ramachendra v. Hari Kamti*² quoted by me with approval, and adopts the conclusion arrived at by the majority in the Calcutta and Allahabad Full Bench cases already referred to. But the learned Judges add nothing new to the reasoning on which the above Calcutta and Allahabad Full Bench cases proceed, and I see no reason to depart from the decision of this Court in *Seshagiri v. Pichu*³ and to change the conclusion I have come to on

1. I. L. R., 26 B. 437.

2. I. L. R., 11 B. 318.

3. I. L. R., 11 M. 452.

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a review of the English and Indian decisions bearing on the question.

My learned colleague, however, is not prepared to follow the decision of this court in *Seshagiri v. Pichu*¹ and to concur with me in the view I take that the plaintiff has, by operation of law, a charge upon the defendant's share in the estate in respect of the amount he claims from him by way of contribution. He accordingly proposes that the question may be referred to a Full Bench for decision.

Before therefore actually deciding this question in this appeal and remitting the proposed issue to the District Judge, I agree with my learned colleague that the question be referred for the opinion of a Full Bench.

In Appeal No. 188 of 1900.

This appeal is governed by the judgment in Appeal No. 187 of 1900, and the issues therein will also have to be remitted for trial to the District Judge in this suit, and for the reasons therein given I concur with my learned colleague that this question of law which has been referred to the Full Bench in that appeal be referred to the Full Bench in this appeal also before the issues are remitted for trial.

Moore, J. :—The facts of this case are fully given in the judgment of my learned colleague, and I need not repeat them. At the hearing of this appeal an important question has been raised which it is necessary to adjudicate on in order to determine whether the plaintiff's claim is barred by limitation. That question is whether when one of several co-sharers in an estate pays the land revenue due on the estate and saves it from sale, he by reason of such payment acquires a charge on the share of his defaulting co-sharer. It is admitted that the provisions of the Revenue Recovery Act do not give a co-sharer a charge on the estate in the case now under consideration (*vide* section 35, Act II of 1864 (Madras) as amended by section 1, Act I of 1897 (Madras). No doubt as pointed out by Wilson J. in the judgment *Kinu Ram Das v. Mozaffar Hossain*², no strong inference can be drawn from an enactment such as a Revenue Recovery Act either for or against

1. L. R., 11 M. 252.

2. I. (L. R. 14 C. 809 at 830.

the principle now contended for on behalf of the plaintiff, but, on the other hand, it cannot be looked upon as a matter of no importance that the local legislature when very recently engaged in amending this Act should have refrained from giving a co-sharer by legislative enactment the right now contended for. I shall later on refer to this matter again. It appears to be clear that under English Law a co-sharer in a case similar to the present one would not by his payment acquire a charge on the share of his co-sharer. As to this reference may be made to the judgments in *Leslie v. French and Falcke*¹ v. *Scottish Imperial Insurance Company*². All the High Courts with the exception of Madras are against the principle now contended for. In Calcutta no doubt the course of decisions was for some years in favour of the right of a co-sharer to a charge. These decisions are commented on by Wilson, J. in the judgment in 14 Cal. to which I have already referred (*vide pp.* 827-829). As is there pointed out most of these decisions were based on certain observations of their Lordships of the Privy Council in *Nugendar Chunder Ghose v. Kaminee Dossee*³, but these observations did not amount to more than a dictum and could not be held to be applicable to any case but the one then actually before their Lordships, *i.e.*, the case of a mortgage. In 1887 by a Full Bench Judgment the Calcutta High Court finally decided against the right of a co-sharer to a charge *Kinu Ram Das v. Mozaffer Hossain Shaha*⁴. A Full Bench of the Allahabad High Court has arrived at a similar decision in *Seth Chitor Mal v. Shib Lal*⁵. In 1886 Sir Charles Sargent, the Chief Justice of Bombay expressed an opinion on this subject which is in accordance with the view taken by the Calcutta High Court up to the Full Bench decision of 1887 (*vide Achut Ram Chandra Pai v. Hari Kamti*⁶) but his remarks cannot be held to be more than *obiter dicta* and the Bombay High Court has now in a decision which has been reported since this case was argued before us followed the Judgments of the Calcutta and Allahabad High Courts in *Shiv Rao Narayan v. Pundlik Bhaire*⁷. A different view has no doubt been taken by our own Court *Seshugiri v. Pichu*⁸. The state of the decisions being as I have thus briefly shown, I regret that I am

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1. L. R., 23 Ch. D. 553.

2. L. R., 34 Ch. D. 234.

3. 11 M. I. A. 241.

4. I. L. R., 14 C. 809.

5. I. L. R., 14 A. 273.

6. I. L. R., 11 B. 313.

7. I. L. R., 26 B. 437.

8. I. L. R., 11 M. 452.

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unable to concur with my learned colleague in the view that he has taken of this question. To quote the words of Edge, C. J., in the decision to which I have already referred "Justice, equity and good conscience are captivating terms, but before a Judge applies what may appear to him at first sight to be in accordance with Justice, equity and good conscience he must be careful to see that his views are based on sound general principles and are not in conflict with the intentions of the legislature or with sound principles recognized by authority in *Seth Chitor Mal v. Shib Lal*¹. If in this present case, I sitting as a member of a Bench of two Judges were to acquiesce in the adoption of the principle now contended for on behalf of the plaintiff, I should have to refuse to be guided by the decisions of the English Courts of law, of the High Courts of Calcutta, Allahabad and Bombay and also by what I believe to be the intention of the Legislature. This I am not prepared to do. As to the intention of the Legislature in this matter I entirely concur in the observations of Wilson, J., to be found at page 832 of the judgment of the Calcutta Full Bench in *Kinu Ram Das v. Mozaffer Hossain Shaha*². As the view taken by my learned colleague with which I am unable to concur is in accordance with the decision of this Court reported in *Seshagiri v. Pichu*³, I am of opinion that the question should be referred to a Full Bench for decision.

I agree with Mr. Justice Bhashyam Iyengar on the other questions raised in these appeals (187 and 188) as set out in his judgment and also as regards the issues that he proposes to send down to the District Judge for trial.

For the reasons stated severally in the foregoing judgments we refer the following question for the opinion of the Full Bench:—

"Whether in case in which one of two or more co-sharers owning an estate subject to the payment of revenue to Government pays the whole revenue in order to save and so does save the estate from liability to be sold by Government for realizing the arrears of revenue he is by operation of law entitled to a charge upon the share of each of his co-sharers, for the realization of the latter's share of the revenue, as between the co-sharers?"

1. I. L. R., 14, A. p. 273 at P. 299.

2. I. L. R., 14 C. 809.

3. I. L. R., 11 M. 452.

OPINIONS OF THE FULL BENCH.

SUBRAHMANIA AIYAR, J. :—In the argument before us it was contended that S. 100 of the Transfer of Property Act, read with S. 82, gave the appellant the charge claimed.

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The point is to my mind not quite free from doubt. I think it unnecessary to decide it, as I am decidedly of opinion that the appellant is entitled to the charge claimed, as a matter of justice, equity and good conscience.

Subrahmania
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Almost everything that could be urged in support of this view will be found referred to and discussed ably, either by *Mitter, J.*, in the Calcutta Full Bench Case, or by *Mahmood, J.*, in the Allahabad Full Bench Case, or by my learned colleague *Bhashyam Aiyangar, J.*, in his very exhaustive judgment in the present case.

Whilst refraining from stating in my own words their arguments on the point, as I by doing so, would be taking up time unprofitably, I think I ought not to omit to observe that this case convinces me that there is far less likelihood of any unsound rule being laid down in this country in consequence of the supposed deceptive character of the phrase “justice, equity and good conscience,” than there is of judges refusing to accept a sound rule from, I say with all deference, what is little short of a prejudice to that time-honoured phrase, introduced of old by wise legislators and universally accepted as words compendiously denoting those ultimate principles of what is right and proper, fair and reasonable, and good and expedient,—principles which Judges here as elsewhere cannot help resorting to in dealing with the difficult questions, not directly governed by existing precedents, which often arise in the course of the administration of justice.

It is quite true that for the enunciation of such principles, we mainly and generally look to English decisions and text books of repute. But I fail to see why we are precluded from, when necessary, considering and following rules laid down in the sister island of Ireland, where the same system of common law and equity is administered by a judiciary neither less able nor less learned than that in England, if such rules appear to us to be the best suited to the conditions and requirements of this country.

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In order to show that the view adopted in *Seshagiri v. Pichu*¹, and since then more than once followed in this court, is not a pseudo-equitable doctrine peculiar to Ireland, but true equity accepted and enforced as such without any reference to any analogy that may or may not be furnished by the principle of maritime salvage lien, in jurisdictions remote from Ireland, but administering the same common law and equity, I may also draw attention to what is alluded to in the passage cited by *Bhashyam Aiyangar, J.*, from *Freeman on Co-tenancy*, and quote a fuller statement by another writer of the law on this point in those parts of the United States where it has arisen. In page 265 of *Sheldon on Subrogation* (2nd Edition), it is pointed out that "one tenant in common upon redeeming the estate from a *tax* sale, though he will not acquire an absolute title, yet, if his payment were necessary for the protection of his own estate, may hold the estate under his *tax* title until they pay or tender to him their proportion of the taxes." Though there are several decisions supporting this statement of the law, for the present purpose it is sufficient to quote the observations of *Shipley, C. J.*, in the early case of *Walker v. Eaton*² decided in 1849, as showing that the doctrine has all along been rested in America only on broad grounds of justice and equity. The learned Judge says: "If one who may be obliged to redeem the share of a co-tenant to relieve his own share from incumbrance, could have no right to retain the share of such co-tenant as security and to obtain a re-imbursement of the amount equitably chargeable to it, he might utterly fail to obtain compensation. And yet his co-tenant, without making any payment, might be entitled to the full possession and benefit of his share of the land, discharged from the incumbrance. The law cannot justly be charged with such results as is produced by conformity to its provisions. The principle is well established and is of frequent application in the redemption of mortgages, that one having a legal interest in an estate under incumbrance, may redeem the whole estate when necessary to redeem his own share or to relieve his own title from incumbrance even against the pleasure of a co-tenant or other owner, and may be regarded as the assignee of the incumbrance upon the other shares or interests, and may obtain possession of them to secure a reimbursement of the amount equitably chargeable to them.

1. I. L. R., 11 M. p. 462.

2. 50 Am. Decision p. 937.

"A sale made for the payment of taxes is but an incumbrance upon the estate so long as the right to redeem exists. The purchaser receives and holds the title as security for money paid; and such a title is in principle a mortgage although it does not exist in a form to be included in our statute provisions respecting mortgages. By the application of this principle to cases of this kind complete justice may be done to all interested in the land and without it such a result would fail to be accomplished." (See at page 640.)

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The force of this reasoning in so far as it bears upon the fairness and propriety of our upholding the existence of a lien in the circumstances of the case is not weakened by the fact that there is no personal right of contribution in such cases in America. From what I have said, it will be apparent that I would follow the decision in *Seshagiri v. Pichu*¹ even if I were satisfied that that decision was unwarranted by the trend of English authorities cited for the respondent, which I think, however, is open to doubt. Assuming those authorities are really opposed to the view I am here following, that we are not to be governed by them, is manifest from the decision of the Judicial Committee in *Bhagavati Prasad v. Radha Kishen*² referred to and followed by *Benson and Bhashyam Aiyangar, JJ.* in Second Appeal No. 788 of 1901 in this Court. There, to put the facts quite briefly, S advanced money to N, agent of B, for purchasing certain immoveable property for B and N executed in favour of S a hypothecation for the money, on the property purchased. Treating, for special reasons, the hypothecation as invalid, the Judicial Committee held that S was in equity entitled to a charge upon the property for the money lent. After stating the facts which, it will be seen, raised a case much weaker than the present, and in fact an extreme case, their Lordships' decision is expressed in one single sentence, implying that the matter admitted of no question or controversy. They said, "The facts admitted by Bir Bahader and also found by the court in the former suit between these parties are sufficient to show that the appellant, as the representative of Sarju Prasad, is entitled in equity to have it declared that the sums claimed with interest are a charge upon the property." Having before me this decision

1. I. L. R., 11 M. p. 452.

2. I. L. R. 15 A. p. 304.

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which no ingenuity can explain away, I feel no hesitation in declining to accept the view now adopted by the other High Courts on this question as sound.

It is thus clear to me that the decision in *Seshagiri v. Pichu*¹, did not create any new law, but was simply an application, to the class of cases of which the present is a type, of a general principle, which is firmly established in equity jurisprudence and of which Ss. 82 and 95 of the Transfer of Property Act, S. 32 of Act II of 1864, and S. 501 of the Code of Civil Procedure, are but instances of statutory application to particular descriptions of cases with such qualifications as in each case were deemed necessary.

My answer to the question referred is therefore in the affirmative.

DAVIES, J.—Were the matter “*res integra*,” I should be inclined to adopt the view taken by the other High Courts in India, though there is much to be said on both sides of this really difficult question. But as the decisions of this court have been uniform that a charge is created upon the land by payments such as this, I am not prepared to differ from my learned colleagues in again upholding the same opinion.

BENSON, J.—I have no hesitation in answering the question referred to us in the affirmative. Under S. 2 of Madras Act II of 1864 it is expressly declared that “the land, the buildings upon it and its products shall be regarded as the security for the public revenue,” due on the land, and S. 42 shows that it is a first charge on every portion of the estate. Bearing this in mind, it seems to me clear that the principles of equity on which Ss. 82 and 100 of the Transfer of Property Act are based, if not the very words of those sections, are applicable to the case before us, and that this is so, is placed beyond all doubt, by the language of the Privy Council in *Nugendar Chunder Ghose v. Kaminee Dossee*² and *Bhagavati Prasad v. Radha Kishen*³ quoted a few days ago by *Sir Bhashyam Aiyangar* and myself in deciding Second Appeal No. 788 of 1901. If it were necessary I should have no difficulty in holding that the words “by operation of law” in S. 100 of the Transfer of Property Act, are more extensive than the words “by law,” and that a charge created “by operation of law” includes a charge created directly by the provisions of an Act, as in the case

1. I. L. R., 11 M. p. 452. 2. 11 M. L. A. 241 at p. 258. 3. I. L. R., 16 A. 304.

before us, as well as other charges created indirectly as a legal consequence of certain conditions. Apart, however, from the Transfer of Property Act, I think that the principle laid down in this Court by *Kernan, J.*, in *Seshagiri v. Pichu*¹ fourteen years ago, and ever since followed, so far as I am aware, by the courts in this Presidency, is amply supported by the decisions of the Privy Council to which I have referred. I can see no danger, but a great deal of justice and equity in following that principle in determining the question referred for our decision.

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I would answer it in the affirmative.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH.)

Present :—Mr. Justice Subramania Aiyar, Mr. Justice Davies
and Mr. Justice Benson.

Subudhi Rantho and 14 others... *Petitioners** (*Accused*).

v.

Balaram Padhi (deceased) ... *Respondent* (*Complainant*).

Penal Code, Ss. 374 & 442—Zemindar and ryot.—Zemindar entitled to share in crops—Removal by ryot without payment to Zemindar—Dishonest intention—Property before delivery.

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A ryot in a zemindary holding on a varam tenure in taking away the crops reaped by him without paying the zemindar's share is not guilty of theft under S. 374, C. P. C., as he does not take away anything out of the possession of the Zemindar.

But if the ryot remove the crops dishonestly or fraudulently, i.e., with a view to defeat the Zemindar's right to be paid a share in the crops, the ryot is guilty of an offence under S. 424, Penal Code.

Whether a Zemindar acquires property in the share due to him before delivery :—*Quære.*

Petition under Ss. 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the Court of the General Deputy Magistrate of Guntur in Criminal Appeal

1. I. L. R., 11 M. 454.

* 11th December 1902. C. R. C. No. 78 of 1902. C. R. P. No. 52 of 1902

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No. 24 of 1901, presented against the finding and sentence passed by the Second Class Magistrate of Aska in C. C. No. 71 of 1901.

T. Rangachariar for *P. S. Sivaswami Aiyar* and *V. Ramesam* for petitioners.

The Public Prosecutor (E. B. Powell) for respondent.

The Court made the following

ORDER :—This is not the case of a farm labourer or cultivator for wages, nor that of a person entitled to the crops jointly with others as partners. It is the case of an ordinary ryot in a zemindari holding on a varam tenure. Until the delivery by the tenant to the zemindar of the share of the crop payable to the latter, the possession of the whole crop, inclusive of such share, is clearly with the tenant. This being so, the removal of even the whole crop by the tenant is not a taking of anything out of the possession of the zemindar. Consequently the first element in the offence of theft is wanting. But the removal, if dishonest or fraudulent, constitutes an offence under S. 424 of the Penal Code, even if, as contended for the petitioners, the zemindar acquires no property in the share due to him until delivery—a point on which it is unnecessary for us to express an opinion in the present case. None of the unreported cases to which our attention has been drawn conflict with this view. If the removal was for the purpose of protecting the ryot from injury or damage to the crops owing to the zemindar's delay or refusal to perform his part with reference to the harvesting and division of the crop, such removal would of course not be dishonest. But in this case it has been proved that the crops were removed dishonestly, and we are not prepared to say that that finding is not well-founded. The result is that we alter the conviction from theft under S. 379, Indian Penal Code, into one under S. 424 of the Penal Code, leaving the conviction under S. 143 to stand. We see no reason to interfere with the sentences.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(FROM THE MADRAS HIGH COURT.)

Present:—Lord Macnaghten, Lord Lindley, Sir Andrew Scoble,
Sir Arthur Wilson, Sir John Bonser.

Raja Rajajee Bahadur ... *Appellant.**

v.

Raja Parthasarathi Appa Row and others. *Respondents.*

Grant by Government—Estate in arrears of revenue—Claim for maintenance past and future—Grant in satisfaction of such claim—Right of resumption.

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In consequence of arrears of revenue due to Government by the Zemindar of Nidadavole who owed various other debts to other persons, and among them arrears of maintenance to a younger branch, an arrangement was come to by which a portion of the estate should be given to the Nuzvid Zemindar who was the biggest creditor and the remaining should be handed over to the Zemindar "in the event of his satisfying the other creditors", the Government relinquishing their claim. In order to carry out such arrangement, the estate was purchased by the Government in revenue sale and a portion of estate was given to the Nuzvid Zemindar and an adjustment was made through the mediation of Government with the other creditors by which the Tangallamudi Mutta was assigned in satisfaction of the claims of the younger branch upon the Zemindar of Nidadavole for past and future maintenance. Some time after this adjustment, the Nuzvid Zemindar granted the estate of Chevendra in perpetuity to the same branch for a similar purpose, and a partition was effected among the different members of the younger branch with the privity of the Zemindars of Nuzvid and Nidadavole by which each of the 2 estates was allotted to the several members.

Held, by P. C. (1) that the grant of Tengallamudi was a grant by Government,
and

(2) that the said grant was not resumable but created on heritable estate in the grantees.

The judgment of their Lordships was delivered by

Sir Andrew Scoble :—For some years after succeeding to his estate Narayya, Zemindar of Nidadavole, was in serious pecuniary difficulties. He owed a large sum of money to his kinsman, the Zemindar of Nuzvid, besides considerable sums to other creditors and to Government for arrears of revenue. In 1839, a compromise was effected whereby a portion of the Nidadavole estate was to be handed over to the Nuzvid Zemindar in satisfaction of his claim, and to complete the matter, it was proposed that the Government demand should be relinquished, and "the remaining portion of the

* 13th December 1902.

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estate" made over to Narayya, "in the event of his satisfying other private creditors."

In order to carry out these arrangements the Court of Directors of the East India Company, in a despatch, dated 24th August 1842, directed that the whole estate of Nidadavole should be sold; and this was accordingly done, and the estate was purchased by the Government for eight lakhs of rupees. By this purchase the Government became absolute owner of the estate, and the proprietary rights of Narayya were for the time extinguished. The claim of the Zemindar of Nuzvid was satisfied by the transfer to him of certain villages; but the Board of Revenue, in a letter, dated 4th January 1844, recommended that it was not advisable that Narayya should be placed in possession of his part of the estate "until all questions connected with the subject be definitely settled."

Among these questions was the satisfaction of the claims of the other private creditors. It was proposed by the Collector of Masulipatam, who represented the Government in the negotiations, that "the most possible method of adjusting these claims, if the consent of the parties could be obtained, would be by the transfer, permanently or temporarily as the circumstances of each case might appear to require, "of a certain portion of the estate, from the proceeds of which each claim might be realised" and an adjustment on this basis was eventually made "after frequent conferences" between Narayya and the various parties in the presence of the Collector.

Of the claims thus adjusted, the only one with which their Lordships have to deal is that of Simhadri and Venkatadri, the representatives of a younger branch of Narayya's family who were entitled to maintenance out of the estate, and to whom a considerable sum was owing for arrears. The terms of the settlement with these claimants are contained in two documents which are thus described in paragraph 9 of the Collector's report to the Board of Revenue, dated 18th November 1843:—"Enclosures 5 and 6 contain stipulations entered into by Narayya on the one hand, and Simhadri and Venkatadri on the other, by which it is agreed that eight villages appertaining to the Ambarpettah Muttah..... and two Mocassah villages.....shall be permanently alienated to Simhadri and Venkatadri, they paying the peishcush which may be

assessed on them.....This cession, it will be observed, is proposed not only in full satisfaction of the whole amount of arrears due for marriage expenses and the monthly allowance of 400 rupees due for this period, but also in lieu of all further payment on account of the monthly allowance." In forwarding the Collector's proposals for the sanction of Government, on 4th January 1844, the Board of Revenue say: "The alienation in favour of the Simhadri branch of the family, it is proposed, shall be in perpetuity." The final orders of Government appear to have been given on this basis; and Simhadri and Venkatadri were placed in possession of the villages which may conveniently be described as the Tangellamudi Muttah.

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On the 15th March 1846, the Zemindar of Nuzvid assigned the Muttah of Chavendra to Simhadri and Venkatadri in satisfaction of their claims upon him for maintenance past and future, and on the 7th August 1846, the two brothers made partition of their joint property under which Simhadri took the Muttah of Tangellamudi, and Venkatadri took Chavendra and two other villages. This partition was made "through and in the presence of Narayya" and proceeded on the assumption that Tangellamudi and Chavendra were held on the same absolute and permanent tenure. Simhadri died in 1861, and his widow Sitayya succeeded to his estate, Sitayya died in 1885, and the contest in the suit under appeal is now between her daughter's son (who would be her heir according to Hindu Law) and persons who claim either under Venkatadri or Narayya. The sole question is whether, under the settlement of 1844, and the subsequent partition of 1846, Simhadri acquired an absolute title to the Tangellamudi Muttah.

Upon the history of the case, as above stated, their Lordships have no doubt that the origin of the title was in a grant from the Government, and not from Narayya, who at the time of the transaction had no estate out of which he could make a grant. Nor do the documents relied on by the respondents, and which have already been mentioned as enclosures 5 and 6 to the Collector's report of 18th November 1843 conflict with this view. These documents are two *arzis*, dated 13th August 1843, addressed to the Collector of Masulipatam, one by Narayya, and the other by Simhadri and Venkatadri. It was contended on behalf of the respondents that the *arzi* signed by Narayya was, as regards seven

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of the villages mentioned therein, a grant by him for maintenance only, and therefore resumable on the death of Sitayya, the last person entitled to maintenance thereout. This was the view taken by the Subordinate Judge who tried the case in the first instance, and by the High Court of Madras on appeal. But their Lordships are unable to accede to this view. The *arzi* signed by Narayya was in no sense a conveyance. It was, as its name denotes, a petition to the Collector, which, after stating the terms of settlement agreed on between the parties, went on to say—"Further, that no claims of whatever nature may hereafter be for ever advanced, either by them for the payment of the said allowances, or by us regarding the aforesaid villages. I also gave my assent, and agree to abide according to the aforesaid conditions, and humbly solicit you will therefore be pleased to forward our petitions with your recommendation to the Honourable Government and to the Board of Revenue, and at the time when the Nidadavole and Bahurzally Pargannahs as well as Ambarpett Muttah may be made over to me by the Circar, allow the aforesaid eight villages in the Ambarpett Muttah to be taken possession of by the said Simhadri and Venkatadri and continue the aforesaid conditions in force." These words leave no doubt that what Narayya contemplated was a grant by the Government to Simhadri and Venkatadri of these villages in full settlement of their past and future claims on the estate, and by the partition in 1846 Simhadri's title to them was completed.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, and the decrees of the Courts of the Subordinate Judge and the High Court reversed, and the plaintiff's suit dismissed with costs throughout. The respondents who were substituted for Papamma Row, the original respondent, must pay the costs of the appeal, including the costs of the revivor proceedings.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.
Lakshmayya ... Appellant* (2nd Defendant).

v.

Bollareddy and others ... Respondents (*Plaintiff 1st Defendant & Plaintiff's representatives*).

Regulation X of 1831—Transfer of Property Act, S. 65 (c)—Mortgagor and Mortgagee—Mortgagor in possession—Default in payment of revenue—Revenue sale—Mortgagor not purchaser—Mortgagor buying from purchaser at revenue sale—Rights of mortgagee—Taking advantage of one's own wrong.

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Where the defaulter is a minor, and arrears of revenue have accrued during his minority, the estate of minor cannot be sold the having regard to the provisions of Regulation X of 1831. But the estate descending to the minor from his father may be sold for arrears which became due during the life-time of the father.

A mortgagor in possession is under a duty to his mortgagee to pay the public revenue accruing due on the mortgaged property. [Transfer of Property Act, 1882, S. 65 (c)].

Where a mortgagor makes default in payment of public revenue due by him, suffers the property to be sold for such revenue and purchases the property at such revenue sale, the mortgage in favor of the mortgagee is not extinguished but still subsists, for the principle of law is that a man cannot be allowed to take advantage of his own wrong. The same is the case with a mortgagee in possession who on failing to pay the arrears of revenue payable by him upon the mortgaged property becomes himself the purchaser at the revenue sale brought about by his own default and the mortgagor has then a title by estoppel to redeem the mortgage as against the mortgagee.

The mere fact that the mortgagor who fails to pay the revenue due by him does not buy the property at the revenue sale does not affect the right of the mortgagee if the mortgagor or his representative subsequently buys the mortgaged property from the purchaser at the revenue sale.

Second Appeal from the decree of the District Court of Kistna in A. S. No. 634 of 1899 presented against the decree of the Court of the District Munsif of Guntur in O. S. No. 686 of 1895.

The properties in question originally belonged to the 1st defendant who had mortgaged them to the 2nd defendant. Default having been made in payment of the Government revenue, the properties were sold and purchased by one Lingappa. The 1st defendant re-purchased the properties from Lingappa some time after the revenue sale and mortgaged them to the plaintiff who has now sued to recover the amount due to him on the mortgage by sale of the properties. The 2nd defendant claimed priority under his mortgage. The Courts below held that the revenue sale operated as a

* S. A. No. 867 of 1900.

15th September 1902.

Lakshmayya statutory extinguishment of the mortgage in favour of the 2nd
v.
Bollareddy. defendant under Act II of 1864 and that the mortgagee's claim against the property ceased under section 73 of the Transfer of Property Act IV of 1882 and decreed the plaintiff's claim. On second appeal by the 2nd defendant, it was contended that the revenue sale was brought about by the default of the 1st defendant, that though the 2nd defendant could not set up his mortgage against Lingappa, the property became burdened again with the 2nd defendant's mortgage the moment it was purchased by the defaulter (the 1st defendant) himself from Lingappa, (section 65 of the Indian Trusts Act II of 1884) and that neither the 1st defendant nor the plaintiff who claimed under the 1st defendant subsequent to the re-purchase could be permitted to plead the 1st defendant's own wrong in making the default and the consequent revenue sale as operating in extinguishment of the 2nd defendant's mortgage.

C. Ramachandra Rao Sahib for appellant.

K. Jagannatha Aiyar for *K. Subrāmanya Sastri* for respts.

The Court delivered the following

JUDGMENT:—We do not think that the decrees of the Courts below can be supported. Inasmuch as the land was sold during 1st defendant's minority for arrears of revenue, we must take it, having regard to Regulation X of 1831, that it was sold for arrears which became due during the lifetime of 1st defendant's father. It was a duty which the 1st defendant's father, as mortgagor, owed to his mortgagee (under whom 2nd defendant claims as assignee) to pay the public revenue accruing due on the mortgaged property which continued to be in his possession [S. 65 (c) Transfer of Property Act, 1882]. This duty the father failed to perform and, the arrears not having been paid by the 1st defendant before the day fixed for sale, the land was sold under Act II of 1864 to realize the revenue. Linga Reddy purchased the land, and under Act II of 1864 the land vested in him free of the mortgage. A few years afterwards the property was purchased by 1st defendant from Linga Reddy and on the same day was mortgaged by 1st defendant to plaintiff and this suit is now brought to enforce that mortgage by sale of the land. The Courts below have held that the 2nd defendant's prior mortgage was extinguished by the revenue sale, and have given plaintiff a decree

for sale of the land on the footing that 2nd defendant had no mortgage thereon.

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If the 1st defendant himself, instead of Linga Reddy, had been the purchaser at the revenue sale, it is clear that the 2nd defendant's mortgage would not have been extinguished and that he could enforce his mortgage against 1st defendant just as if there had been no revenue sale, *Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhya Saram Khan*¹ and the plaintiff who claims as mortgagee under the 1st defendant cannot be in a better position than 1st defendant himself. The principle of law on which that decision was based was mainly that a man cannot be allowed to take advantage of his own wrong, and that, therefore, the mortgagor in that case had a title by estoppel to redeem the mortgage as against the mortgagee who failed to pay the arrears of revenue and himself become the purchaser at the revenue sale brought about by his own default. This principle is, in our opinion, applicable to the present case notwithstanding that the property vested free of mortgage in Linga Reddy, and the fact that the 1st defendant did not purchase the property himself at the revenue sale, but from Linga Reddy who was the purchaser at the revenue sale, makes no difference as between himself and his mortgagee. He cannot be allowed to take advantage of his father's wrong and plead for his own benefit that by reason of such wrong there has been a statutory extinction of 2nd defendant's mortgage security. We may observe that the same principle underlies S. 65 of the Indian Trusts Act in the case of trust property.

We shall therefore have to set aside the decrees of the Courts below and give plaintiff a decree as a puisne mortgagee only, the 2nd defendant having the rights of a prior mortgagee

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Moore.

Rangasamy Naicken ... Appellant* (*Plaintiff*).

v.

Jellibodi Naicken and others ... Respondents (*Defendants*).

Prior and puisne mortgages—Suit by prior mortgagee—Puisne mortgagee no party—

Purchase by prior mortgagees in execution of decree upon his mortgage—Rights of prior and puisne mortgagees—Prior mortgagees's right to recover possession—Puisne mortgagee's right to redeem—Redemption amount—Price of equity of redemption.

Rangasamy
Naicken
v.
Jellibodi
Naicken.

* S. A. No. 598 of 1901.

1st September 1902.

1. 10 M. I. A. 540 at 557.

Rangasamy
Naicken
v.
Jellibodi
Naicken.

Where a prior mortgagee brings a suit upon his mortgage without making the puisne mortgagee a party and in execution of the decree obtained in such suit purchases the mortgaged property he is not entitled to recover possession without redeeming the puisne mortgagee in possession.

Venkata Somayajulu v. Kennam Dhora, followed.

The second puisne mortgagee is also entitled to redeem the prior mortgagee whether the latter's omission to implead the former in his suit is wilful or in ignorance of the existence of the second mortgage. The amount which he puisne mortgagee is to pay for redemption is not the price paid by the prior mortgagee for his purchase of the equity of redemption but only the amount which he may have had to pay if made a party to the suit by the prior mortgagee.

Second Appeal from the decree of the District Court of Coimbatore in A. S. No. 117 of 1900, presented against the decree of the Court of the District Munsif of Coimbatore in O. S. No. 238 of 1899.

S. Kasturiranga Aiyangar for appellant.

T. R. Krishnasami Aiyar for respondents.

The Court delivered the following

JUDGMENT :—The case is exactly on all fours with that of *Venkata Somayazulu v. Kannam Dhora*¹. The plaintiff clearly could not obtain possession without paying off the second mortgagee who was in possession, and the plaintiff's suit for possession might have been dismissed on that ground as the plaintiff did not offer to redeem. The second mortgagee, however, was willing to pay off the plaintiff's prior mortgagee as he might have done if he had been made a party to the suit brought by the plaintiff on his mortgage. The second mortgagee is clearly not liable to suffer because the plaintiff failed to make him a party to that suit and it makes no difference to the second mortgagee whether the plaintiff's failure was wilful or due merely to ignorance of the existence of the second mortgage.

As to the amount which the second mortgagee has to pay we agree with the lower courts in holding that it is the amount he would have had to pay if he had been made a party to the plaintiff's suit, as he ought to have been. He clearly cannot be made liable for more because the plaintiff in ignorance of the second mortgage paid an excessive price for the equity of redemption. The second appeal fails and is dismissed with costs.

If the money had not been already deposited the time for the second mortgagee paying it is extended by two months from this date.

1. I. L. R., 5 M. 184.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Moore.

Pakuru Dasu Appellant*
(Plaintiff).

v.

Bheemudu Respondent
(Defendant).

Madras Act I of 1886, Ss. 22 and 24, cl. (e)—License to sell arrack—Subletting by Pakuru Dasu license-holder—Duty of license-holder and sub-lessee to obtain collector's permission—No sanction—Illegal agreement. v.
Bheemudu.

Where there is a duty both on the part of an holder of a license to sell arrack (cl. 21 of the license issued under S. 24, cl. (e) of Madras Act I of 1886) and on the part of his assignee or sub-lessee (S. 22, Madras Act I of 1886) to obtain the collector's permission to the sub-letting, an agreement by the license-holder that his sub-lessee should sell arrack and pay profits to the license-holder without the collector's sanction is illegal and cannot be enforced.

Second Appeal from the decree of the District Court of Ganjam in A. S. No. 103 of 1900 presented against the decree of the Court of the District Munsif of Sompeta in O. S. No. 103 of 1900.

This was a claim for the recovery of Rs. 56-0-0, being the balance of the value of 159 gallons of arrack and profit on 111 gallons and 32 drams of arrack received from plaintiff according to an agreement, dated 5th December 1896, executed by the 1st defendant's father and the 2nd defendant in favor of plaintiff who was a licensee of the arrack shop at Sompeta for 1896-1897. On the preliminary objection that the agreement was illegal and invalid, as one made without the sanction of the collector required by S. 22 of the Abkari Act, and the clause of the license granted to the plaintiff, the District Munsif dismissed the suit. The District Judge upheld his decision. Hence this second appeal.

V. C. Seshachariar for appellant.

V. Ramesam for respondent.

The Court delivered the following

JUDGMENT:—Section 22 of the Abkari Act I of 1886 imposes a duty on the lessee or assignee, that is, on the defendant, not the plaintiff in this case; but clause 21 of the plaintiff's license, which

* S. A. 134 of 1901.

1st September 1902.

Pakuru Dasu v. Rheemudu. is issued under section 24, clause (c) of the Act, imposes the duty on the plaintiff also as grantee of Government to obtain the collector's license for his lessee, the defendant.

Thus there was a legal duty on the part of both the plaintiff and the defendant to obtain the Collector's permission to the sub-letting. They failed to do so, and the contract entered into between them that defendant should sell arrack was illegal, and the plaintiff therefore cannot sue on it.

We dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Venkata Narasimha Appa Row ... Appellant* (*Plaintiff*).

v.

Sobhanadri Appa Row and others ... Respondents (*Defendants*).

Venkata
Narasimha
Appa Row

v.
Sobhanadri
Appa Row.

Decision as to legality of resumption—Judgment in second appeal—Subsequent suit between same parties—Res judicata.

A decision in a suit as to the legality of a resumption which has become final by judgment passed in second appeal is *res judicata* in a suit subsequently heard between the same parties and involving the same question.

Appeal from the decree of the Subordinate Judge's Court of Kistna in O. S. No. 5 of 1899.

Raja T. Rama Row for appellant.

C. Ramachandra Rao Sahib for respondents.

This appeal coming on for hearing, the Court delivered the following

JUDGMENT:—In Second Appeal No. 80 of 1901 affirming the decision of the District Judge we have found that the resumption of the 15 kattis by the Zemindar was legal. The parties in the present appeal were parties therein and the above matter was litigated between them. The present claim is, therefore, barred as *res judicata* by the decision in that suit. *Subbammal v. Huddleston*¹, *Ahmed v. Moidin*², *Gururajamma v. Venkatakrishnama Chetti*³, and *Balkishan v. Kishan Lal*⁴.

We therefore dismiss this appeal with costs.

* A. No. 52 of 1901.

18th September 1902.

1. I. L. R., 17 M. 278.

3. I. L. R., 24 M. 360.

2. I. L. R., 24 M. 444.

4. I. L. R., 11 A. 148.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies and Mr. Justice Benson.

Chidambara Pillai ... Appellant*
in both (2nd
v. Defendant.)

Swaminathan and another ... Respondents in both (*Plaintiff and 3rd Defendant*).

Will—Not found at the time of testator's death—No presumption of revocation in Chidambaram India.

Where a will is shown to have been in the possession of the testator at some time before his death but is not found at the time of his death, there is no presumption that the will has been revoked by the testator.

Second appeals from the decrees of the Subordinate Judge's Court of Tanjore in A. S. Nos. 758 and 759 of 1899 presented against the decrees of the Court of the District Munsif of Nega-patam in O. S. Nos. 386 of 1898 and 150 of 1899.

Kalia Pillai had two sons, Ponnusami Pillai, the 1st defendant, and Doraisawmy Pillai, the deceased father of the plaintiff. Kalia Pillai inherited one of the plaint houses from his maternal uncle and the other house was bought by him from his own funds. As regards the latter house the finding was that though it might have formed originally part of the family or ancestral property of Kalia Pillai, it was sold to discharge the debt of the 1st defendant and repurchased by Kalia Pillai with his separate funds. The plaintiff claimed to recover the houses on the ground that the same were the self-acquisitions of Kalia Pillai and that the latter devised the same among others to the plaintiff by a will, dated 22nd November 1888. The actual claim was limited to a room in a house and to a portion of the other. Both courts held that both the properties were the self-acquisitions of Kalia Pillai, that the will was true and valid and not revoked and decreed the plaintiff's claim. Hence these second appeals.

* S. A. Nos. 638 and 639 of 1901.

8th September 1902.

Chidambara
Pillai
v.
Swamina-
than.

C. Sankaran Nair for appellant.

P. R. Sundara Aiyar for respondents.

The Court delivered the following

JUDGMENT :—We are not prepared to say that in this country there is a presumption that a will has been revoked by the testator when it is shown that it was in his possession some time before his death, but is not found at the time of his death.

If there is any such presumption, it is one of fact and depends on all circumstances of each case. Here both the Courts have found as a fact that there is no evidence of revocation, and we cannot say that that finding is one which, in the circumstances of the case, they were not entitled to arrive at.

We dismiss the second appeals with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies and Mr. Justice Bhashyam Aiyangar.

Innassi Muthu Pillai ... Petitioner*
in C. R. P. No. 348 of 1901
(2nd Defendant).

Thomasu Pillai and another ... Petitioners
in C. R. P. No 349 of 1901
(Defendants 2 and 3).

v.

Savuthia Pillai ... Respondent
in both (Plaintiff).

Innassi Muthu & Thomasu v. Savuthia Pillai. Provincial Small Cause Courts Act (IX of 1887)—Suit for mesne profits—Not cognizable by Court of Small Causes.

A suit for the recovery of mesne profits is not a suit cognizable by a Court Small Causes.

Savarimuthu v. Aithirusu Rowther, I. L. R., 25 M. 103 followed.

Petitions under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Temporary Subordinate Judge of Trichinopoly in S. C. S. No. 38 of 1901.

Plaintiff and 1st defendant bought some lands jointly.

* C. R. P. Nos. 348 and 349 of 1901.

9th September 1922.

Plaintiff got a decree in O. S. 215 of 1893 and O. S. 14 of 1894 for a moiety of the lands and obtained possession on 9th September 1898. He subsequently brought O. S. 10 of 1898 for mesne profits due to him from the date of plaints in O. S. 215 of 1893 and O. S. 14 of 1894 till date of the plaint in O. S. 10 of 1898 and obtained decree. He now brought this suit in the Small Cause side (S. C. S. 38 of 01) for recovery of mesne profits due from the date of the plaint in O. S. 10 of 1898 till date of recovery of possession on 9th September 1898. The 2nd and 3rd defendants were impleaded as the sons of the 1st defendant. The Subordinate Judge passed a decree against defendants 1 to 3. These revision petitions were filed respectively by the 1st defendant and by the 2nd and 3rd defendants on the ground that the Subordinate Judge had no jurisdiction and that the suit was not cognizable by a Small Cause Court under Article 31.

T. V. Seshagiri Aiyar for petitioners.

V. Krishnasami Aiyar for respondent.

The Court delivered the following

JUDGMENT:—This suit was not cognizable by a Court of Small Causes as we take it that the ruling of the Full Bench in *Savarimuthu v. Aithirusu Rowther*¹ when read with the order of reference therein applies to all suits for the recovery of mesne profits.

We set aside the decree and direct the District Judge in whose jurisdiction the case now is, to return the plaint for presentation to the proper Court. The parties will bear their own costs hitherto incurred including the costs of the petitioners.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Annammal and others ... Appellants* (*Defendants*).

v.

Venkatara-gavachari ... Respondent (*Plaintiff*).

Agricultural tenant—Notice to quit in a month—Bad notice—Darkhast grant—Fraud upon revenue authorities—Grant not binding on Government.

A notice given to a tenant in possession of an agricultural holding in March to quit in April next (i. e., in a month) is a bad notice.

Annammal
v.
Venkatara-
gavachari.

* S. A. 546 of 1901.

1. I. L. R., 25 M. 103.

2nd October 1902.

Annammal v. Venkataragavachari. *Seemle*, where a darkhast grant is obtained by fraud the proper course for the party affected is to apply to the revenue authorities to cancel the grant and for a grant to himself. A grant obtained by fraud practised upon the revenue authorities will not bind Government and may be revoked or set aside by the revenue authorities.

Second appeal from the decree of the District Court of South Arcot in A. S. No. 319 of 1889 presented against the decree of the Court of the District Munsif of Panruti in O. S. No. 189 of 1899.

T. Rangachariar for appellants.

P. S. Sivaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT:—The plaintiff in the plaint alleged that the land was held by the defendants under an oral lease from year to year granted by the plaintiff in 1896, and that he gave the defendants notice to quit and surrender the land in March 1899. The suit was brought in April 1899.

The plaintiff contends that his intention was that the surrender was to be in April 1899. Assuming that it was so, we do not think that so short a notice was a reasonable notice in the case of an agricultural holding. On this ground and without deciding the other issues in the case we reverse the decree of the lower appellate Court, and restore that of the District Munsif with costs in this and in the lower appellate Court.

As regards the validity of the darkhast grant under which the plaintiff claims, but which the defendants say was obtained by fraud, we observe that the proper course is for the defendants to move the revenue authorities in the matter and apply for a grant of puttah to themselves in supersession of the grant made in the plaintiff's favour. We need hardly add that if it is proved that the plaintiff got the grant by practising fraud upon the revenue authorities, the grant would not bind Government and might be revoked by the revenue authorities.

Narayana
Raja
v.
Ramachandra
Raja.

R. Subrahmania Aiyar for appellant.

The Acting Government Pleader (C. Sankara Nair) for 3rd respondent.

The Court delivered the following

JUDGMENTS :—MOORE, J. No evidence has been placed on record in this case, but it is admitted that the first defendant had lands in two separate villages, Alagapuri and Sammandhapuram, for which he held separate pattas. It is further admitted that no arrears of revenue were due on the lands in Alagapuri at the date of either the court sale or the sale on account of arrears of revenue of those lands. The acting Government Pleader further states that although the information at his disposal is not such as to enable him to make any positive statement as to the facts he is prepared to admit for the purpose of argument that at the date of the court sale no arrears on account of land revenue were due by the first defendant in any village.

The lands entered in the patta held by the 1st defendant in Alagapuri village were on the 25th June 1897 sold in execution of the decree in O. S. No. 140 of 1896 on the file of the District Munsif of Srivilliputtur and purchased by the plaintiff. Subsequently in November or December 1897, the same land was sold on account of arrears of revenue due by the 1st defendant and purchased by the 2nd defendant. The plaintiff sues for a declaration that this sale is invalid. Both the Lower Courts have decided against him and he has consequently filed this second appeal here. It is not alleged that the plaintiff on the strength of the sale certificate granted to him, applied to the Collector for transfer of the patta for the lands in Alagapuri to his name. Section 3, Regulation XXVI of 1802, lays down that no transfer of land which is not registered shall exempt the person in whose name the entire estates are registered from paying the revenue due to Government from such land. From this provision of law it is clear that, as pointed out by *Collett, J.*, in the decision reported in *Mangamma v. Timmapaiya*¹ under this Regulation, as against Government and for the purpose of exemption from liability to revenue, a transfer without change of registry is not valid. It follows therefore that the transfer by court sale of the lands in Alagapuri from the

1. 3 M. H. C. R. 134 at 136.

1st defendant to the plaintiff did not relieve the 1st defendant or the lands from liability on account of land revenue due by him for those lands inasmuch as there was no change of registry regarding them in the Collector's office.

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v.
Ramachandra
Raja.

Moore, J.

The further question, however, that has to be considered is whether the lands in Alagapuri village which had been bought at a court sale by the plaintiff remained liable on account of revenue arrears due by the 1st defendant not on them, but on other lands in a different village. Section 5, Act II of 1864 (Madras), no doubt provides that all the moveable and immoveable property of a defaulter wherever it is to be found can be proceeded against in order to recover arrears of land revenue due by him, but the question to be decided is whether after the purchase of the Alagapuri lands in court sale by the plaintiff, they can be held to have remained the property of the defaulter. At the hearing of this second appeal, I was inclined to hold that as the patta of the Alagapuri lands had not been transferred they still remained the property of the pattadar in so far at all events as liability for Government revenue was concerned, but having since then considered the provisions of section 6, sub-sections (3) and (4) of Act I of 1890, I am of opinion that this view is incorrect, and that all that was sold at the revenue sale at which the 2nd defendant was the purchaser was the interest of the defaulter in the land and that interest was then in consequence of the prior sale at court auction and purchase by the 1st defendant, practically nothing.

The decrees of both the lower courts should be reversed and the plaintiff given a decree as prayed for with costs throughout.

DAVIES, J.:—My view is that the land the plaintiff had bought in the court sale was not liable to be sold under the Revenue Recovery Act, because at the time of sale (1) there were no arrears of revenue due upon it, and (2) it then ceased to form part of the defaulter's property. Reading sections 3, 4, 5 and 25 of the Act together, it seems to me clear that the land which is liable to be sold for arrears of revenue must either be the land upon which the revenue is due, or that it must be land which is the property of the defaulter. It is admitted that the land sold in this case did not comply with either of those conditions. Section 3 of Regula-

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—
Davies, J.

tion XXVI of 1802, which runs as follows : "Transfers of land made by individual persons without being so registered in the registers of the Collectors, shall not be valid in the Courts of *Adalat*; and such transfers of land, being unregistered, shall not exempt the persons in whose names the entire estates are registered from paying the revenue due to Government from such lands," has been relied on in this court in support of the judgments of the Courts below. The construction now wished to be placed upon that section is that the words "entire estates" mean all the estates of the individual, but they will not in my opinion bear that interpretation. The plural "estates" has reference to the plural "persons," and when used with reference to one person must be read in the singular "Estate." Now the word "Estate" means the "land" (the words are also used as synonymous in section 25 of the Act) and the land must be such land as had revenue due to Government upon it before section 3 of the Regulation can be made applicable to it. The land bought by the plaintiff was held by the 1st defendant, the defaulter, under a separate patta in another village and had no connection whatever with the land for which the revenue was due to Government. A patta represents a whole or entire estate as held by this court in *Secretary of State for India v. Narayanan*¹. Land held under another patta must therefore be deemed to form another estate. In no case has it been held that a holding means all holdings from Government under different pattas in different places. So that what the plaintiff bought was a separate estate distinct from that on which revenue was due, and as no revenue was due on that estate, the plaintiff's purchase was not subject to the payment of revenue due on other land on (as it would appear) the fiction that what the plaintiff purchased was still the defaulter's property when, in fact, it was not. I, therefore, agree with my learned colleague in reversing the decrees of both the lower courts and decreeing the plaintiff's claim with costs throughout.

1. I. L. R. 8 M. 131.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Ponnammal ... Appellant* (1st Defendant).

v.

Kalithitha Moodelly ... Respondent (Plaintiff).

Transfer of Property Act, S. 68—Mortgage document—One attesting witness not called Ponnammal
—No objection taken in first Court—Raising of objection in appeal—Waiver. v.
 Kalithitha
 Moodelly.

Where a mortgage document is tendered in evidence but an attesting witness was not called to prove execution as provided in S. 68 of the Transfer of Property Act and no objection is taken on that score in the first Court, it must be taken to have been waived and the objection cannot be taken up in appeal.

Appeal from the decree of the Subordinate Judge's Court of Bellary and Salem at Salem in O. S. No. 18 of 1898.

P. S. Sivaswami Aiyar for appellant.

T. Narasimha Aiyangar for *R. Shadagopachariar* for respondent.

The Court delivered the following

JUDGMENT:—The only point argued before us is that the mortgage in plaintiff's favour was not proved by examining at least one attesting witness as provided in section 68 of the Indian Evidence Act.

No objection was taken to the admissibility of the document when tendered as evidence in the lower Court. If objection had been taken, the defect, if any, would no doubt have been cured. We cannot allow the objection to be now taken after it was waived in the lower Court.

We dismiss this appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Ponnammal Appellant* (*Defendant*).

v.

Ratnam Asari Respondent (*Plaintiff*).

Ponnammal *Limitation Act, Sch. II, Art. 119 and 142—Gift by adoptive mother—Invalid against*
 v. *adopted son—Possession taken by donee under gift—Interference of adopted son's*
 Ratnam *rights—Suit for possession more than 6 years after—Limitation.*
 Asari.

A deed of gift by the adoptive mother in favour of her daughter, in pursuance of an alleged testamentary direction by the donor's husband is in the absence of such direction invalid as against the adopted son and possession taken by the daughter under such gift is a direct interference with the rights of the adopted son.

A suit brought by the adopted son more than 6 years after such possession by the daughter will be barred under Art. 119, Sch. II, Limitation Act, 1877, and is not governed by Art. 142.

Appeal from the decree of the Subordinate Judge's Court of Bellary and Salem at Salem in Original Suit No. 3 of 1898.

P. S. Sivaswami Aiyar, for appellant.

T. Narasimha Aiyangar for *R. Shadagopachariar*, for resp't.

The Court delivered the following

JUDGMENT :—We cannot agree with the Subordinate Judge that the suit is governed by article 142 of the Indian Limitation Act as the plaintiff cannot make out a title otherwise than as an adopted son. The appellant took possession of the plaint property in 1891 by virtue of a deed of gift in her favour executed by her mother professedly in obedience to a testamentary direction given by her late husband. The plaintiff had already been adopted by her in 1886, and she did not execute the deed of gift as his guardian. It is found that no such testamentary direction was given by the adoptive father and, that being so, the plaintiff was entitled to possession of the property as his adopted son and the possession taken by the defendant under the deed of gift was a direct interference with the right of the plaintiff as the adopted son. The suit was brought more than six years after the defendant took possession of the property and is, therefore, barred by article 119, schedule 2, Indian Limitation Act, in accordance with the decision of the majority of the Bench of this Court in the connected Appeal Suit No. 52 of 1900.¹

We, therefore, allow the appeal, and reversing the decree of the lower Court, we dismiss the plaintiff's suit with costs throughout.

* A. No. 85 of 1901.

15th October 1900.

1. 13 M. L. J. R. 27.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Bhashyam Aiyangar.

Akilandammal ... Appellant* (*Defendant*).

v.

Ratnam Asari ... Respondent (*Plaintiff*).

Limitation Act, Schedule II, Art. 119—Interference of adopted son's rights—Interference with regard to other properties—Starting point for limitation.

Akilandammal.

v.

Ratnam Asari.

The interference by the defendant which is the starting point for limitation under Art. 119 need not relate directly to property sought to be recovered in the suit.

Where therefore the defendant interfered with plaintiff's right as adopted son with respect to certain property and more than six years after such interference the plaintiff sought to recover by virtue of his adoption certain property from the defendant :—

Held, that the suit was barred by Art. 119.

Appeal from the decree of the Subordinate Judge's Court of Bellary and Salem at Salem in Original Suit No. 8 of 1897.

P. S. Sivaswami Aiyar for appellant.

T. Narasimha Aiyangar for *R. Shadagopachariar* for respondent.

The Court delivered the following

JUDGMENT :—The Subordinate Judge held that article 119 of the Indian Limitation Act does not apply to this case because there was no interference with the plaintiff's right as adopted son in the property claimed in this suit more than six years before the suit was brought.

It is admitted and found by the Subordinate Judge that this very defendant did interfere with the plaintiff's rights as adopted son in 1889 in regard to certain property which was the subject-matter of Original Suit No. 7 of 1897. This interference was more than six years before the present suit, and there is nothing in column 3 of article 119 of schedule 2 of the Indian Limitation Act to justify the view of the Subordinate Judge that the interference which is the starting point for limitation should relate directly to the property sought to be recovered in the suit.

Akiland-
ammal.
v.
Ratnam
Asari.

The present suit is brought to recover certain sums which were recovered, or which ought to have been recovered by the defendant in virtue of a certificate which she obtained under Act 27 of 1860, the grant of which had been ordered before the plaintiff's adoption, and the plaintiff seeks to recover those sums from the defendant solely by virtue of his right as an adopted son. That being so, in accordance with the decision of the majority of the Bench of this court in appeal suit No. 52 of 1900¹, we must hold that article 119 is applicable and that the suit is barred.

We reverse the decree of the Subordinate Judge and dismiss the plaintiff's suit with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Narayana Row ... Appellant* (3rd Defendant).

v.

Dharmachar ... Respondent (Plaintiff).

Narayana Row v. Dharmachar. *Specific Relief Act S. 9.—Possessory title—Prior possession—Dispossession—No authority of true owner—Plea of Jus tertii—Suit for possession after six months.*

Possession is a good title against all but the true owner.

Asher v. Whitlock (1865), L. R. 1 Q. B. 1; *Sundar v. Purvati* I. L. R., 12A 51; *Ismail Ariff v. Mahomed Ghous* (1890), I. L. R., 20 C. 834; and the dictum of *Subrahmanya Aiyar J. in Mustapha Sahib v. Santha Pillai*, I. L. R., 23 M. 167 followed.

Prior possession for any time short of the statutory period will entitle the holder to a decree for recovery of possession in a suit brought more than six months after dispossession, provided the defendant is a trespasser and cannot establish any title to the disputed land.

A trespasser or a wrongdoer cannot plead *jus tertii* unless he can show that the act complained of was done by the authority of the true owner. The effect of S. 9 of the Specific Relief Act is only that if a summary suit be brought within the time prescribed by that section the plaintiff therein who has been dispossessed otherwise than in due course of law will be entitled to be reinstated even if the defendant who thus dispossessed him be the true owner or a person authorized or claiming under him but a decree in such a suit will not have the force of *res judicata* on the question of title.

Nisa Chand Gaita v. Kanchiram Bagari I. L. R., 26 C. 572 dissented from.

* S. A. No. 679 of 1901.

7th October 1902.

1. 13 M. L. J. R., 27.

Second Appeal from the decree of the District Court of Salem in A. S. No. 225 of 1899, presented against the decree of the Court of the District Munsif of Krishnagiri in O. S. No. 659 of 1898.

Narayana
Row
v.
Dharmachar.

Joseph Satya Nadar for appellant.

P. S. Sivaswamy Aiyar for respondent.

The Court delivered the following

JUDGMENT:—The facts found by the lower appellate Court and which in Second Appeal we have to accept are, that the uncle of the plaintiff, one Jayachar, was in possession of the site mentioned in the plaint since 1881, that he let defendants 1 and 2 into possession of the same in 1892 under a lease for a term of 5 years, that the 3rd defendant, the appellant in this Court, obtained possession of the same from the 1st and 2nd defendants and that Jayachar died in 1898 shortly before the institution of this suit, leaving a will devising the site to the plaintiff and admitting in the description of the site that it had all along been the plaintiff's property and that he, Jayachar, held it only as the plaintiffs' agent. The District Judge also finds that the case of the 3rd defendant that the site belongs to him and that his agent allowed defendants 1 & 2 to enter into possession thereof is false, but that he obtained possession from the 1st and 2nd defendants during the term of the lease under which they had been let into possession by the plaintiff's uncle on the footing that up to the date of his death or at any rate until the 3rd defendant obtained possession of the site from the 1st and 2nd defendants. Jayachar was in possession of the site, through his tenants defendants 1 and 2, either on his own behalf or as agent of the plaintiff and in the former case, the plaintiff derives title to possession under the will of Jayachar. The District Judge decreed in favour of the plaintiff and reversed the Munsif's decree, which dismissed the plaintiff's suit on the ground that the plaintiff did not establish his title to the site. The appellant's counsel contends that the decree of the District Judge cannot be supported, as he does not find that the plaintiff has made out his title that the possession which he finds in favour of Jayachar assuming that such possession will enure to the benefit of the plaintiff not being for the statutory period can give the plaintiff no

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title by prescription and that therefore the District Munsif's decree ought to be restored, notwithstanding that both the courts have found that the 3rd defendant has failed to establish title in himself.

The District Munsif found that neither the plaintiff nor the 3rd defendant was the owner of the site, but that one Srinivasa Row was the owner, and that on his death his sons have become entitled to the same as his heirs. If, as found both by the District Munsif and the District Judge, Jayachar was in possession since 1888, it must be presumed that he was the owner thereof, and that if he had held such possession on behalf of and as agent for the plaintiff, the plaintiff must be presumed to be the owner (S. 110 of the Indian Evidence Act). Though this presumption is rebuttable and, as found by the District Munsif, it has been rebutted, it is unnecessary to call upon the District Judge to submit a finding as to whether or not he concurs in the finding of the District Munsif, that Srinivasa Rao's sons are the owners of the site for even in the view that they were the owners at the date of this suit, the District Judge was right in holding that Jayachar's possession—whether it was on his own behalf or as the plaintiff's agent, was sufficient to entitle the plaintiff to recover the site from the 3rd defendant who has established no title to the same nor possession prior to that of Jayachar and who by wrong, obtained possession of the site from the 1st and 2nd defendants as if they had been let into possession by himself and they had surrendered the same to him, and who has been withholding possession of the site from Jayachar and the plaintiff since and subsequent to the determination of the lease under which the 1st and 2nd defendants were holding under Jayachar. In the language of modern English authorities, "possession is good title against all but the true owner. (*Asher v. Whitlock*¹, and a person in peaceable possession of land has, as against every one but the true owner, an interest capable of being inherited, devised or conveyed." *Asher v. Whitlock*, per Markby, J. at pp. 2 and 3). As observed by Subramania Aiyar, J. in *Mustapha Saib v. Santha Pillai*² the above principle of law is so firmly established as to render a lengthened discussion about it quite superfluous. There is nothing in the Indian Law which militates against this principle and with

1. (1865) L. R., 1 Q. B. D. 1 at 6.

2. I. L. R., 23 M., 179 at 183.

all respect we are wholly unable to concur in the view taken by Calcutta High Court in *Nisa Chand Gaita v. Kanchirum Bagari*¹ that previous possession for any time short of the statutory period will not entitle a plaintiff to a decree for recovery of possession in a suit brought more than six months after dispossession even if the defendant could not establish any title to the disputed land. In our opinion, S. 9 of the Specific Relief Act, corresponding to S. 15 of Act XIV of 1859, is in no way inconsistent with the position that as against a wrong-doer prior possession of the plaintiff in an action of ejectment is sufficient title even if the suit be brought more than 6 months after the act of dispossession complained of and that the wrongdoer cannot successfully resist the suit by showing that the title and right to possession are in a third person. A plea of *jus tertii* is no defence unless the defendant can show that the act complained of was done by the authority of the true owner. (*Graham v. Peat*² and *Chambers v. Donaldson*,³ and it is immaterial however short or recent, the plaintiff's possession was (*Calteris v. Cowper*,⁴ *Doe d. Hughes v. Dyeball*,⁵ The only effect of section 9 of the Specific Relief Act is that if a summary suit be brought within the time prescribed by that section, the plaintiff therein, who was dispossessed otherwise than in due course of law, will be entitled to be reinstated even if the defendant who thus dispossessed him be the true owner or a person authorized by or claiming under him, but a decree in such a suit will not have the force of *res judicata* on the question of title.

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The rule of English Law that possession is good title against all but the true owner was adopted and enforced by the Judicial Committee of the Privy Council in two Indian cases (*Sunder v. Parbati*,⁶ and *Ismail Ariff v. Muhomed Ghous*,⁷. In *Sunder v. Parbati* the Judicial Committee observed that the Chief Justice of the Allahabad High Court was right in his statement of the law, that according to the import of the authorities cited by him "possession is a good title against all the world except the person who can show a better title. By reason of his possession such person has an interest which can be sold or devised. But their Lordships,

1. I. L. R., 26 C. 579.

2. 1 East 244.

3. 11 East 65.

4. 4 Taunt, 547.

5. 1 Moo. and M. 346.

6. I. L. R., 12 A. 51 at p. 56.

7. I. L. R., 20 C. 834.

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being of opinion that the Chief Justice erred in not applying that law to the facts of that case, held that the widows of a deceased Hindu had a possessory title or interest in his estate notwithstanding that a preferable title might exist in others through the deceased devisee of their husband, and that the estate being jointly held by the widows though for a time short of the statutory period after the death of the devisee was partible between the widows and that either widow might maintain a suit for partition against the other.

In *Ismail Ariff v. Mahomed Ghous*¹, it was held that possession of land was sufficient evidence of right as owner, as against a person who had no title whatever and that the plaintiff was entitled to obtain a declaratory decree and an injunction restraining the wrongdoer from interfering with his possession.

The principle underlying the rule of law in question seems to be that acquisition of title by operation of the law of limitation, being a lawful mode of acquiring title, the person in peaceable possession is entitled to maintain such possession against all but the true owner and that therefore a third party who has no better title than the person in possession has no right to invade upon the possession of the latter and interrupt or arrest his lawful acquisition of title by his continuing to remain in possession for the statutory period. It is the true owner alone that is entitled to arrest his title as against the person wrongfully in possession and prevent such wrongful possession ripening into prescriptive title. But a third party who, without deriving title under the true owner and without his authority, interrupts such possession before it has ripened into prescriptive title, is a trespasser not only against the true owner, but also against the party actually in possession and subject to the law of limitation either of them is entitled to maintain a suit in ejectment against such intruder, as a trespasser.

As the second appeal fails on this ground it is unnecessary to consider the other ground on which also the decision of the District Judge is based. The second appeal is, therefore, dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subramania Aiyar and Mr. Justice Davies.

Maharaja of Jeypore	...	...	Petitioner*
<i>v.</i>			<i>(Appellant, Petr.)</i>

Neladevi and another ... Respondents
(*Respondents Counter-Petitioners.*)

*Agency Rules—Vizagapatam Agency tracts—Rule XXXI—Act XXIV of 1839, S. 4— Maharaja of
Rule ultra vires—Grant for maintenance—Attachment.* Jeypore.

It was competent for the Governor-in-Council acting under S. 4 of Act XXIV of 1839 to reserve any control in himself over the agents and their subordinates in the exercise of their judicial powers.

The enactment of a Rule XXXI by the Governor-in-Council providing that petitions received by the Governor against the orders of the Agent and his Assistant with respect to execution of decrees be referred to certain authorities is not *ultra vires*.

The Provisions of the Civil Procedure Code do not apply to the Agency Tracts.

A grant of land made to a widow for her maintenance is not exempt from attachment under Rule XXXI, Cl. (2).

Application under Rule 31 of the Agency Rules for Vizagapatam district, praying for review of the judgment of the Agent to the Governor at Vizagapatam, in Mis. Ap. No. 1 of 1900 against the proceedings of the Court of the Senior Assistant Agent at Vizagapatam, in C. M. P. No. 10 of 1899.

V. Krishnasami Aiyar and C. R. Thiruvenkatachariar for petitioner.

P. R. Sundara Aiyar for respondents.

The Court made the following

ORDER:—Objection was taken on behalf of the respondents that Rule XXXI of the Vizagapatam Agency Rules gave no general right of petitioning the Government, but only presented the channel through which petitions that were otherwise provided for should pass. If this view were correct, the rule would have been quite unnecessary, as at the time it was enacted there were no cases in which petitions were otherwise provided for. The cases to which our attention has been drawn were provided for subsequently to the passing of Rule XXXI. Rule XXXI must therefore have

* C. M. P., No. 792 and 794 of 1900.

17th December 1902.

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been intended to provide for cases for which no previous provision had been made—such as petitions relating, like this, to matters in execution of decrees, for which no appeal was allowed. It is unlikely that Government should have overlooked the necessity for providing for revision by them of the orders of the agent and his assistants in the very important subject of execution of decrees when several rules have been made regarding the subject, and the control of Government in the matter is expressly reserved in one instance (see Rule XXII). The provision in the Rule XXXI that the petition thereunder received may be referred to certain authorities, shows that the rule was one of a substantive character and not merely to provide for the formality to be observed in the submission of the petition. Our view is the same as that taken in *Chakrapani v. Varahalamma*¹.

It was next contended that if the rule was what we consider it to be, it was *ultra vires*, inasmuch as it was in excess of the powers conferred upon the Government by section 4 of Act 24 of 1839 under which the rules were made. We are unable to agree with the contention that it was not competent for the Governor in Council acting under that section to reserve any control in himself over the agents and their subordinates in the exercise of their judicial powers. The words “to determine in what suits an appeal shall lie to the Sadar Adawlut” should not be understood as restricting the Government from making rules for the control of the agents and their subordinates otherwise than by appeal to the Sadar Adawlut and the words “to determine to what extent the decisions of the agents in civil suits shall be final” have been held in *Maharajah of Jeypore v. Jammanadhora*², not to disable the Government from making the decisions of the agents subject to review under the orders of the Sadar Adawlut as provided in Rule XX although no appeal is provided for. We consider that the words “to prescribe such rules as he may deem proper for the guidance of such agents etc.,” are wide enough to warrant the Governor in Council to reserve to himself a power of control such as he gives himself under Rule XXXI. Under the Act the operation of the ordinary lands within the Agency tracts was excluded and the control of the administration of justice was virtually vested in the Governor in Council as is implied from the

1. I. L. R., 18 M. 227.

2. I. L. R., 24 M. 345.

provision empowering him to make such rules in that respect as he deems proper, without any limitation to his powers. The designation of the officer in whom the actual administration of justice was vested in the Act namely the "Agent to the Governor" shows that the Legislature itself recognized his subordination to the Governor, leaving it to the Governor to define and explain the extent of such subordination by rules. As in our opinion the Rule XXXI was not "*ultra vires*" the question whether it was validated under the Indian Councils Act 24 and 25 Vic. Chap. 67, S. 25 does not arise.

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It was further urged that the order was not that of the agent but of his assistant, and so Rule XXXI was inapplicable, but we find that the order was passed under the authority of the Agent as is expressly stated therein.

Coming to the merits we must take it that the Agent's order refusing to attach and sell the property in execution of the decree was not passed in the exercise of his discretionary power under the concluding part of clause 2 of Rule XXXI, but because the Agent considered the property was not liable to be proceeded against in execution of the decree. The Agent relied on a provision of the Civil Procedure Code which does not apply to the Agency tracts. The property sought to be attached *viz.*, the interest of the defendant in the land, even assuming it was a grant for her maintenance, is not exempted from attachment under the proviso to clause 2 of Rule XXXI by which alone the Agent was bound. He should, therefore, have granted execution unless the application for execution was barred by limitation. This the Agent held was not the case, with reference to the only contention before him that it had become barred subsequent to August 1896. Though the correctness of this view could not be impeached, the respondent's vakil wanted to show that the execution of the decree had become barred previous to 1896. As this point was not raised before the Agent, and no satisfactory explanation was forthcoming why it had not then been raised, we must decline to allow the question of limitation to be re-opened in the manner suggested. We must therefore reverse the order in question and direct that the application for execution be restored to the file and proceeded with in due course. The petitioner's costs in this Court should be paid by the respondent.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

PETITION FOR SPECIAL LEAVE TO APPEAL FROM KATHIAWAR.

Present :—The Lord Chancellor, Lord Macnaghten, Lord Davey, Lord Robertson, Lord Lindley, Sir Andrew Scoble and Sir Arthur Wilson.

On appeal from the Governor in Council of Bombay and from the Court of the Political Agent at Kathiawar.

Maun Bhagwanji Kanji.

v.

Darbar Shri Vala Jasa Rukhad and another.

Hemchand Deochand.

v.

Azam Sakarlal Chotamlal.

Bhagwandas Becharadas and others.

v.

Vala Manasia Nag and another.

Privy Council Practice—Special leave to appeal.

Special leave to appeal may be granted where the point is a new or moot one and is important and arguable.

Where the Governor-in-Council of Bombay to whom an appeal lay from the Court of the Political Agent at Kathiawar has dismissed an appeal overruling the contentions which are precisely similar to those raised by the petitioner, the latter is entitled to ask for special leave without previously appealing to the Governor-in-Council of Bombay.

MR. HALDANE :—May it please your Lordships, there are three petitions before you relating to Kathiawar. I am here to open the first of them, but I may state that the difference between them is that in this first there is an application for special leave to appeal straight from the Court of the Political Agent, whereas in the second the petition for special leave to appeal is from the decision of the Governor of Bombay, sitting, as the petition alleges, in a

Tuesday, February 17th, 1903.

judicial capacity. The third is also from the Political Agent. I will deal with the first. The reason we have for coming straight here in the case of the first is because it would be an idle formality to do otherwise, having regard to the decision of the Governor in the second case.

The petitions raise a question of very substantial general importance as to the position of the court of the Political Agents in Kathiawar. Kathiawar, as your Lordships know, is the Peninsula which juts out in the Northern part of India, just below the Gulf of Kutch. Like so many of the Indian Territories, its organisation is of a kind which is not precisely like any other. In Kathiawar there is no great Sovereign Prince. There are some 400 Talukdars, who are the heads of villages. There is one very considerable Talukdar but he has no jurisdiction over the other taluks. The ordinary taluks are comparatively small places, and the Talukdars are comparatively small people. In that condition of things the substantial and practical Government of the country is, and has been for long, in the Government of India.

LORD DAVEY :—Are these Talukdars hereditary independent Princes ?

MR. HALDANE :—We say not. That is one of the questions which will arise in this case, and which will have to be argued.

LORD DAVEY :—They are under the Political Department ?

MR. HALDANE :—They are under the Political Department. There is a Political Agent who exercises very great powers there. Whether they are Sovereign Potentates, as some of your Lordships know, is a matter which has been the subject of enormous controversy, views of different kinds being taken by Sir Henry Maine, Sir Courtenay Ilbert, Mr. Lee Warner, and other great authorities. The matter did come before your Lordships on a former occasion, but you found means to decide the case, as, indeed, it was, perhaps, not very difficult to decide the case, without solving a conundrum. I do not know that it can be avoided in the present case. What we ask, at all events, is leave to argue the matter fully, because upon these cases depend a very large number of others.

My Lords, what has happened, has been that there has been litigation between merchants, some of them British and some of

them Native, and the owners of these taluks. Large sums of money have from time to time been lent, and securities have been given by the Talukdars, and one of those securities is the subject of the present proceedings. What is complained of, rightly or wrongly, is that the Political Agent has in the first place construed a Rule or Notification, which was made by the Governor-General of India, as retrospective, whereas he ought not to have construed it as retrospective, and he has thereby taken away the remedy upon the bond; and in the second place it is alleged that the notification itself was *ultra vires* in so far as it purported to treat the estate of the Talukdar as the life estate only, instead of an estate in fee. The way the question arose was this. The predecessor in title of the present Talukdar had granted a security over the Taluk for a large sum of money, and the question was whether that was a security which attached to the fee, or only to his life estate.

THE LORD CHANCELLOR :—What is the supposed jurisdiction over this village ?

MR. HALDANE :—As we say the Crown through the Governor-General of India has erected a court, having jurisdiction like an ordinary court, in Kathiawar, and that a decision of the court has been given from which, according to the old rule, an appeal lies, first to the Governor of Bombay in Council, and then, as we say, to your Lordships.

THE LORD CHANCELLOR :—I do not quite follow you. If you are right about that, what right have you to say that it is a useless formality to appeal.

MR. HALDANE :—Because the same point was taken by way of appeal to the Governor.

THE LORD CHANCELLOR :—You do that in this country. You take the judgment *pro forma* of the court to which you ought to go, and then go from it.

MR. HALDANE :—There is power in your Lordships, which you have exercised fairly often, under Vict. 7 & 8 to entertain an appeal. I have the section here; and it has been done in other cases.

THE LORD CHANCELLOR :—What struck me was that you put yourself out of Court by saying that you thought proper to disregard the intermediate Court.

MR. HALDANE :—It would have been so with a Court in this country.

LORD DAVEY :—I suppose you would ordinarily go to the Political Agent, and then you say there is an Appeal to the Governor in Bombay.

MR. HALDANE :—Yes.

LORD DAVEY :—But you did not go to the Court of the Political Agent because he had already decided the same point in two other cases ?

MR. HALDANE :—We did go to the Court of the Political Agent. The only thing we have jumped over in the first Petition is the Governor of Bombay sitting in Council; in the second Petition we have been to the Governor of Bombay sitting in Council.

If your Lordships will be kind enough to look at the petition I will just go shortly through it. It states "That on the 4th of March 1902 your Petitioner filed a suit in the Civil Court of the Assistant Political Agent of Sorath Prant in Kathiawar, in the exercise of its residuary jurisdiction, against Darbar Shri Vala Jasa Rukhad, a sixth class Talukdar, as the heir and legal representative of Vala Bukhad Gorka and Vala Mulu Gorka, who were both Kathi Talukdars of an undivided Hindu family, and in his individual capacity, and against Ajam Naval Shanker Motiram, as the Agency Manager of the estate of the aforesaid Darbar Shri Vala Jasa Rukhad, to recover the sum of one hundred and seventy five thousand eight hundred and sixty two rupees, and four annas, and three pies, being the principal and interest due to your petitioner under a bond entered into on the 31st October 1897 by the aforesaid Vala Rukhad Gorka who died on the 29th July 1898 and the aforesaid Vala Mulu Gorka, who died on the 30th January 1901. (2) That on the 5th March 1902 the said Court of the Assistant Political Agent of Sorath Prant refused to entertain your petitioner's suit by the following Order :—' Sorath Prant. Inward No. 791

Neither Vala Jasa Rukhad has admitted this claim, nor a Certificate of the Political Agent, Kathiawar, has been annexed to this ;—therefore we cannot entertain this suit dated 5th March 1902 Rajkot,” meaning thereby “that under Rule 1 of the Notification 2714 L. A. of the Government of India”—I will draw your Lordship’s attention to its terms in a moment—“it was necessary in order that the suit should lie that the claim should have been admitted by the present talukdar, the first defendant, or that the debt itself should have received the written approval of the Political Agent, and that since neither of these conditions has been complied with, the suit could not be entertained”. Then the notification appears. It is a notification from the Government of India, and it is published “for information and guidance of all concerned,” and signed by Col : Hunter, Political Agent. It is No. 2714. L. A. and it says “Whereas the Tributary Chiefs and Talukdars in Kathiawar have only a life interest in their estates, and cannot therefore charge them with debts beyond their own lives—” We say that that is an erroneous recital, or if it was meant to have operation it was *ultra vires* of the Government of India so to act. “And whereas it was not intended that the Agency Courts in Kathiawar should ordinarily take cognizance of the pecuniary transactions between the said tributary chiefs or talukdars and their creditors. In exercise of the powers conferred by sections 4 & 5, of the Foreign Jurisdiction and Extradition Act 1879 (xxi of 1879). and of all other powers enabling him in this behalf, the Governor-General in Council is pleased to make the following rules for the guidance of the Agency Courts in Kathiawar”. Before I read that, I will draw your Lordships’ attention to the fact that the bond was entered into on the 31st October 1897 and this notification is 1900. “No suit shall lie against a tributary chief or Talukdar or against any sub-sharer of a tributary chief or talukdar in respect of any debt contracted by the predecessor of such Chief or Talukdar or sub-sharer, unless (a) the claim has been admitted by the tributary chief or talukdar or sub-sharer”—that is the first alternative, and that puts it in the power of the Talukdar to say that he will not pay, then “(b) the debt has received the written approval of the Political Agent.” That makes the written approval of the Political Agent a condition precedent to any right to sue on the bond. “2. Courts presided over by an Agency Officer shall

not, save in the exercise of residuary jurisdiction, take cognizance of any other pecuniary claim against a tributary chief or talukdar or any co-sharer of a Tributary Chief or Talukdar unless the Political Agent's certificate consenting to the hearing of the claim is first obtained. (Signed) W. J. Cunningham, Secretary to the Government of India". Then we state that we appealed to the Court of the Political Agent himself, on the ground "(a) that no admission of the claim by the first defendant, nor written approval of the debt by the Political Agent was required before the suit was entertainable—" That was, assuming this regulation to be followed it was not to be construed retrospectively, so as to give away rights that had already accrued. "(b) that the recital in the Notification No. 2714 L. A. of the 22nd June 1900 of the Government of India, viz :—' Whereas the tributary chiefs and talukdars in Kathiawar have only a life interest in their estates, and cannot therefore charge them with debts beyond their own lives ' contains an erroneous proposition of law, and that Vala Rukhad Gorka and Vala Mulu Gorka were full owners of their estates, and not merely life tenants thereof, (c) that the lower Court was in error in not holding that the aforesaid notification affects existing and vested rights, and is not merely a rule of procedure, and cannot therefore be construed as operative retrospectively so as to affect the plaintiff's suit." Then we say "That before this appeal came on for hearing the said Court of the Political Agent of Kathiawar summarily dismissed the Appeals in two other similar suits against the above-named respondents in which the claims were of the same nature as in this your petitioner's suit, and in which the same points were argued in the appeals, and in so summarily dismissing the said appeals the said Court of the Political Agent of Kathiawar quoted and followed its own judgment of 22nd February 1902 in a case in which the issues were identically the same as in these Appeals, and in which judgment, following two previous judgments of the same Court of the 20th September 1898 and the 10th of March 1899, it was held (a) that the Court of the Political Agent is precluded from questioning the validity of the notification of the Government of India, and (b) that the Notification No. 2714 L. A. of the Government of India is retrospective. (5) That on appeal to the Governor in Council of Bombay against the said judgment of the 20th September 1898, the Government of Bombay, on the 13th

of June 1899 declined to interfere with the said judgment and on a subsequent appeal to the Governor of Bombay in Council against another judgment of the Court of the Political Agent of Kathiawar in which it was held that the said Notification No. 2714 L. A. dated the 22nd June 1900 was not only retrospective, but that it applied to the execution of decretal debts, the Government of Bombay, on the 27th January 1902, rejected the appeal. (6) That in view of these decisions, and of the certainty that his own Appeal would be similarly dealt with, and because the points involved in his appeal as well as in those dismissed by the Court of the political Agent of Kathiawar and the Government of Bombay, are important points of law which vitally affect the interests of the mercantile community of Kathiawar, your petitioner applied on the 20th of June 1902 to the said Court of the Political Agent of Kathiawar to be allowed to withdraw his appeal in order that he might take his case direct to Your Majesty in Council," and so on; and we ask leave to appeal.

Now I think the most convenient plan would be that I should tell your Lordships, which I can do by quoting a very few sentences, what happened in the old case. It is in the 1 A. C. at page 332. *Damodhar Gordhan v. Deoram Kanji*. It is also to be found more fully reported in 3 Indian Appeals, but it is quite well reported in the Law Reports.

MR. PHILLIPS :—And also in the Bombay Reports.

MR. HALDANE :—This was a very curious case, because there was territory which had been territory of the Province of Kathiawar which was become territory of the Province of Bombay and which was ceded by the Presidency of Bombay to Kathiawar, but their Lordships held that it was ceded in such a fashion as not to destroy the Jurisdiction of the Bombay Courts, and therefore it was unnecessary to decide whether if it had been ceded there would have lain an Appeal from the Kathiawar Courts. The head note is "In the Province of Kathiawar, subject in its entirety since 1820 to the Supreme Authority of the British Government, the Thakoor Bhownugger was possessed of certain Talooks which had never been brought under the ordinary British Administration and in which the Thakoor exercised a wide Civil and Criminal Jurisdiction, subject only to the Supervision Laws and regulations of the

Kattywar Political Agency. He was also possessed, within the same Province, of other Talooks including Gangli, which in 1802 had been ceded to the British Government, and in 1815 had been placed under the ordinary Jurisdiction of the British Courts of the Bombay Presidency. In 1848 Gangli was included in a lease granted by the British Government to the Thakoor, which by mutual agreement, dated the 23rd October 1860 was cancelled, and thereunder the British Government conceded as a favour, not as a right, the transfer of Gangli and other territories from the District of Gogo which was subject to the regulations to the Districts under the control of the Kattywar Political Agency. Delay having arisen in completing this transfer the Governor-General in Council on the 31st May 1865 authorised its completion, Her Majesty's Secretary of State having decided that Kathiawar was not British Territory." Your Lordships will see when you look at the Report that you refused to decide whether that was a good notification—whether it was an authoritative declaration of Law, or not. "Thereafter on the 29th January 1868 it was notified in effect in the Bombay Government Gazette that Gangli, by reason of the Cession thereof by the British Government to the Thakoor of Bhownugger, was removed from and after the 1st of February of that year from the Jurisdiction of the Revenue ; Civil and Criminal Courts of the Bombay Presidency. And on the 4th of January 1873 (after the Indian Evidence Act 1872 had come into force) it was notified in effect in the Indian Gazette that Gangli was, on the 1st February 1866, ceded to the State of Bhownugger," and so, if that were materially true, had become a part of Kattywar "previous to the notification in 1866," and now we get to the point in the suit—"a decree for redemption of mortgaged land situate in Gangli was made by the British Court of Gogo, and reversed by the Judge of Ahmedabad ; the case being subsequently remanded by the High Court at Bombay to the Judge, who thereupon restored the original decree, notwithstanding that in the interval the first mentioned notification had appeared. The High Court confirmed this order, holding the notification to be insufficient to prove a transfer of Jurisdiction," The effect of that was this ; they went on in the suit as if Gangli continued to belong to the Presidency of Bombay, and the High Court held the notification which I have quoted insufficient to affect that. "In review of

this order the High Court confirmed the same on the ground that it was beyond the power of the British Crown, without the concurrence of the Imperial Parliament, to make any Cession of Territory within the Jurisdiction of any of the British Courts in India, in time of Peace to a Foreign Power. Held by their Lordships that the Appeal from this last mentioned order passed in review must be dismissed. The Jurisdiction of the Courts of the Bombay Presidency over Gangli rested in 1866 upon British Statutes, and could not be taken away, or altered (as long as Gangli remained in British Territory) so as to substitute for it any Native, or other extraordinary Jurisdiction, except by Legislation in the manner contemplated by those statutes. The transfer of British Territories from ordinary British Jurisdiction to the supervision laws and regulations of a Political Agency, by excluding such territories from the British regulations and codes theretofore in force therein, and from the Jurisdiction of all British Courts theretofore established therein with a view to the substitution of a native Jurisdiction under British supervision and control, cannot be made without a Legislative Act. Such transfer of Jurisdiction, even if valid, would not amount to a cession of British Territory to a Native State; nor would it deprive the Crown of its territorial rights over the transferred districts, or the person resident therein of their rights as British Subjects. Although their Lordships entertained grave doubts (to say no more) as to the concurrence of the Imperial Parliament being necessary to effect such cession of territory, yet such Cession is a transaction too important in its consequences both to Great Britain, and to subjects of the British Crown, to be established by the above decision attributed to the Secretary of State, or by any uncertain inference from equivocal acts." Now if your Lordships will be so kind as to look at Lord Selborne's Judgment at page 374 you will find what he said about the status of the Province of Kathiawar. He said "There are in the Province of Kathiawar one or more talooks of large extent and value belonging to the Thakoor of Bhownagger, which (whether that Province ought, or ought not to be regarded as a part of Her Majesty's Dominions) have never been brought under the ordinary administration of the British Government in India. The Thakoor is also the proprietor of other large Talooks (the Town and Port of Bhownagger, and many other villages and

places including Gangli) forming part of the Districts of Dhundooka, and Gogo, &c., which having previously been part of Kathiawar, were ceded by the Peishwa to the British Government in 1802, by the Treaty of Bassein. The territory so ceded was left till 1815 under Native administration; but in that year it was brought under the ordinary Jurisdiction of the British Courts of the Bombay Presidency, and so remained until those proceedings in 1866, the effect of which is now in question. As to these latter estates the Thakoor and all his dependents residing thereon were (beyond controversy) subject to British Law and Jurisdiction." Now Lord Selborne goes on to deal with the larger question. "Before 1802 the whole Province of Kattywar was divided between the Peishwa and the Guikowar, who claimed over it sovereign rights, chiefly consisting of the exaction of Tribute. A smaller number of estates in the Province were held rent-free; but far the greater part of the Chieftains paid tribute of the same character (so far as their Lordships can judge) as the land revenue which is paid to the Government in British India; and Mr. Aitchison, in a work of authority referred to on both sides at the Bar (Treaties Vol. vi p. 366) states that "the sovereignty of the country was understood by the Chiefs to reside in the power to which Tribute was paid. The rest of the rights of the Peishwa in those parts of Kattywar which had not been transferred to the British Government by the Treaty of Bassein were ceded to Great Britain in 1817." So much for the rights of the Peishwa, who was one of the two rulers. Now we come to the Guikowar. "With respect to the Guikowar (leaving out of consideration one or more Talooks of which that Prince is at the present day the direct Proprietor) it appears that in 1807 a settlement was made between the Guikowar and the chiefs tributary to him through the intervention and under the guarantee of the British Government; engagements being then taken for the payment of a fixed revenue by those chiefs whose estates were not held rent-free. The amount of tribute then fixed for the Kattywar estates of the Thakoor of Bhownugger was Rs. 74,000: and as it was thought expedient to consolidate the whole of the claims over all the Thakoor's estates, an agreement was made, with his consent, for the Transfer of the Revenue payable by him to the Guikowar for his Kattywar estates to the British Government as part of the consideration

for certain arrangements which were at the same time made for the support of a contingent force. In 1820 by a further agreement the Guikowar engaged to send no troops into Kattywar and to make no demands upon the Province, except through the British Government. Since that date the Supreme Authority in Kattywar (as far as it has been previously vested in the Peishwa, or in the Guikowar) has been exercised solely by the British Government. The tribute payable by the different chiefs has been collected by the British Authorities, the Guikowar receiving from them the share of it to which he is entitled according to the existing agreements. The tribute payable in 1871 by the Thakoor of Bhownugger (in respect of the aggregate of his Kattywar estates, and of the estates included in the alleged cession of 1866)." And then he states the amount of it. I need not trouble your Lordships with these details. He goes on just about the middle of page 376 to refer to the judicial administration. "Their Lordships have now to refer to the judicial administration of Kattywar. Down to 1831 this appears to have been left, without any regular control, in the hands of the chiefs." I have told your Lordships what very small people these chiefs are. There are over 400 of these Talooks. "But in that year (a Political Agency having been established at Rajcote in 1820) the British Government constituted a Criminal Court of Justice in Kattywar, under the Presidency of the Political Agent, with three or four Chiefs as Assessors, for the trial of Capital Crimes in the estates of Chiefs who were too weak to punish such offences, and of crimes committed by Petty Chiefs upon one another, or otherwise than in the exercise of their recognised authority over their own dependents. Until 1853 every sentence passed by this Court was submitted to the Bombay Government for their approval (Aitchison Vol. VI page 367). In 1862, the whole of this administration was re-organised. The Province was then divided into four Districts (the Eastern District including all the Talooks belonging to the Thakoor of Bhow-nugger), in each of which were placed officers called Political Assistants, with other British Magistrates under them, all under the control of the Political Agent. The entire number Kattywar States under separate Chiefs (large and small) is 188, of whom 96 pay tribute to, or in right of, the British Government only, 70 to or in right of the Guikowar only, and 9 (of whom the Thakoor

of Bhownugger is one) to, or in right of, both Governments (Kattywar Directory), pp. 54-56). These Chiefs were, by the arrangements made in 1862, distributed into seven different classes. To the first class (consisting of four or five, of whom the Thakoor of Bhownuggur is one) unlimited Criminal and Civil Jurisdiction, with the exception of Criminal Jurisdiction in certain cases over 'British Subjects', (however that expression ought to be interpreted) was allowed. The jurisdiction of the second class (either originally, or by the effect of a Circular Order afterwards issued, No. 14 of 1866) was substantially the same. The jurisdiction of the 4 next classes was restricted in criminal matters to limited powers of fine and imprisonment; and in Civil matters to the cognisance of suits of limited amount, the greatest powers (those of the Chiefs of the third class) being to imprison for seven years, to impose fines of Rs. 10,000 and to decide Civil Suits Rs. 20,000 value: while the 6th class could only imprison for three months, impose fines of Rs. 200, and decide Civil Suits of Rs. 500 value. The 7th or lowest class of all was entirely deprived of all Civil Jurisdiction; but in Criminal Cases might imprison for not more than 15 days, and impose fines not exceeding Rs. 25. All other jurisdictions, both Civil and Criminal, throughout the Province, beyond the limits of that allowed to the Chiefs, was reserved to the British Officers and Magistrates under the authority of the Political Agent; and in 1871 there was an establishment of thirty-one such Officers and Magistrates in the whole (Directory, pp. 520-527). In 1863 two elaborate Codes of Regulations (based upon the Indian Penal and other Codes) were promulgated, with the sanction of the Indian Government, for the guidance of the British Judicial Officers and Magistrates in Kattywar (Directory pp. 176-253). These Codes established, both in name and in substance, regular and fully organised Courts of Justice, with powers to execute warrants, and issue Commissions throughout the Province, and to take security from suspected persons in the name of the Queen (Arts. 38, 55, 154, of the Criminal, and Art. 104 of the Civil Code). It may be added that, on the face of these Codes (especially by Art. 10 of the Civil Code, which pointedly distinguishes the Chiefs of Kattywar from 'Sovereign Powers,' and 'Independent Chiefs') and by several later Circular Letters of the Political Agents (No. 11 of

1866, No. 2 of 1867, No 11 of 1869, and that of the 7th May 1868) the whole jurisdiction exercised by the chiefs of all the seven classes is treated as conferred upon them by the British Government." I do not think I need read any more of that judgment. It appears from that, that apparently Lord Selborne and your Lordships at that time thought the sovereignty was in the British Crown, and the Courts which had jurisdiction were the Courts of the Political Agent exclusively. It was not necessary for you to decide that point, because upon the construction of the Cession you held that the jurisdiction of the Bombay Courts had never been parted with. Therefore, while, of course, I cannot rely upon that as a conclusive statement of the law, as I should like, it gives me ground for saying that there is a very considerable *prima facie* case to argue based on the opinion Lord Selborne expressed in that litigation.

THE LORD CHANCELLOR :—If I understand that Judgment what really was the root of it was this, that some of these jurisdictions were conferred by British Statutes, and that limited the power of the British Crown, so that it could not be altered without a Statute.

MR. HALDANE :—I think that was the reason why the limited construction was given to the cession.

Reference has been constantly made in this judgment to an official work called the Kathiawar Directory. It is a large book in several volumes. I think we have all of it here, if necessary, but, there is one passage in the first volume at page 386 which says this.

THE LORD CHANCELLOR :—Will not you tell us what it is ?

MR. HALDANE :—I can best tell your Lordships what it is by shewing you a specimen.

THE LORD CHANCELLOR :—Is it compiled by the Government ?

MR. HALDANE :—I think so. It is an official book. At any rate the Privy Council on the previous occasion treated it as a work of great authority, and, as far as I know it is the only work of the kind which exists in Kathiawar.

LORD DAVER :—It is official ?

MR. HALDANE :—Yes. I do not profess to be able to read what is on the outside, because it is purely native, but there is this "The Kathiawar directory. Revised Edition" &c., (Reads the title.)

THE LORD CHANCELLOR :—It does not look like an official book. It looks as if it were some gentleman's enterprise.

MR. HALDANE :—Your Lordships may be able to do what I cannot—namely read the native description upon the outside.

THE LORD CHANCELLOR :—You can tell us what it is ?

MR. HALDANE :—I can tell your Lordships what it is. It is described by Lord Selborne as a book of great authority, and quoted as official. This is what is said in the preface "It is more than 15 years since the Kathiawar local directory for 1881 was issued" &c., 5c., (Reads extract from preface).

THE LORD CHANCELLOR :—That again does not look like an official statement. However you say it has been quoted before ?

MR. HALDANE :—Yes.

THE LORD CHANCELLOR :—For this purpose I think we may listen to it.

MR. HALDANE :—It has been quoted as Official book ?

THE LORD CHANCELLOR :—This Board has allowed it to be quoted and referred to ?

MR. HALDANE :—Oh yes. I should tell your Lordships this was 13 years later than the case before the Privy Council. That was in 1874, and this is the Edition of 1886. At page 386 there is a statement shewing the authority, and jurisdiction of each Agency in Kathiawar ; at any rate it sets out the jurisdiction of the various people, and it describes the Political Agent as the Chief Political Executive Officer in the Province. (The learned Counsel read an extract from page 386a.) Then in the 2nd volume of the same book there is another passage which I will read at page 1005 of the second part. (The learned Counsel read the extract). My learned friend would like me to read S. 5 clause 1. (The learned Counsel read it).

THE LORD CHANCELLOR :—Is this application *ex parte*

MR. HALDANE :—No. We brought it before your Lordships *ex parte*, and your Lordships said it would be more satisfactory to have the Secretary of State for India here ; and the Secretary of State appears through my learned friend Mr. Phillips. There has been a considerable time to consider this. I do not know what view my learned friend takes. Our case is that the question is one of great importance, involving a great number of cases, and we should wish to argue it fully.

LORD DAVEY :—Your case is I suppose, that the notification, whether valid or not, cannot take away a vested right of action ?

MR. HALDANE :—Yes.

LORD DAVEY :—That it ought not to be construed so as to take it away.

THE LORD CHANCELLOR :—It does not purport on the face of it to be retrospective.

MR. HALDANE :—No. As construed, it has made a new contract between the parties. That is really the effect of the decision. My learned friend asks me to read this at page 107 “ All decisions by the Judicial Assistant in Appeal Cases delegated to him by the Political Agent”, &c., &c., (Reads down to the words) “ within ninety days from the date of the decree appealed against.”

THE LORD CHANCELLOR :—I think we might call on the other side, and hear what they have to say about it. (To Mr. Phillips.) I do not mean necessarily that you are the other side, but you are the Government of India. What we want to hear is what you have to say about it ?

MR. PHILLIPS :—The view the Government of India take is this—that Kathiawar is not British Territory and the inhabitants of Kathiawar are not British subjects.

THE LORD CHANCELLOR :—What one would like to know is ; is it your view there is nothing to be argued here at all, and that it is of no importance, or what ; because, you know, if there is anything to be argued it looks as if there was an important question involved ?

MR. PHILLIPS :—Yes.

THE LORD CHANCELLOR :—What do you say to that ?

MR. PHILLIPS :—I do not say that it is not an important question.

THE LORD CHANCELLOR :—Do you say it is not arguable ?

MR. PHILLIPS :—No.

THE LORD CHANCELLOR :—Then that would seem to shew that we ought to give leave to appeal.

MR. PHILLIPS :—It is quite a new case.

THE LORD CHANCELLOR :—That, again, is an additional reason.

MR. PHILLIPS :—Your Lordships have never entertained an Appeal from Kathiawar that I am aware of.

THE LORD CHANCELLOR :—It seems to me you have given three good reasons why we should give leave to appeal.

MR. PHILLIPS :—If your Lordships think so, I have nothing more to say as to that. That does not in any way conclude the Jurisdiction ?

THE LORD CHANCELLOR :—No ; only that it is a question to be argued.

MR. PHILLIPS :—I do not say that it is not a very important question ; and there are difficulties.

THE LORD CHANCELLOR :—I think you have given most convincing reasons why we ought to give leave to appeal. What about the other appeals ?

MR. HALDANE :—They stand on the same footing—One has been brought direct from the Governor in Council. Probably the convenient course would be to bring them all on together.

THE LORD CHANCELLOR :—Can they be consolidated in any way ?

MR. HALDANE :—I do not think they could be consolidated, but they can be brought on together. There are different parties.

THE LORD CHANCELLOR :—I suppose the individual rights involved may be different, but this one question about the jurisdiction must be common to them all ?

MR. HALDANE :—Yes, and the retrospective construction of the document,

THE LORD CHANCELLOR :—We do not want to have that argued four times.

MR. HALDANE :—It may be that they will be quite separate cases, but there is no reason why your Lordships should not so consolidate them as to treat them practically as one appeal.

THE LORD CHANCELLOR :—Upon that one point. Of course the particular rights or wrongs are individual to the particular cases.

LORD DAVEY :—They will not be formally consolidated, because they are different appellants and different respondents.

MR. HALDANE :—Yes, that is the difficulty.

THE LORD CHANCELLOR :—I daresay we can arrange that in some way or other ; that one point should be argued first before we hear the individual cases.

MR. HALDANE :—I think I can undertake that.

THE LORD CHANCELLOR :—In one event of course we should not hear any more.

LORD DAVEY :—Do you appear for all the appellants ?

MR. HALDANE :—No, not on this occasion. I am instructed only in the first. My junior is instructed in them all.

LORD DAVEY :—And the same solicitors ?

MR. HALDANE :—And the same solicitors. There will be no difficulty. They are really test cases.

THE REGISTRAR :—Then your Lordships give leave on deposit of the usual security ?

THE LORD CHANCELLOR :—Yes.

MR. PHILLIPS :—Do your Lordships require any further attendance on the part of the India Office ?

THE LORD CHANCELLOR :—I do not know that their Lordships will require it, but they thought you ought to have the opportunity. Of course you ought to have liberty to intervene if you wish.

LORD DAVEY. Because one of the questions is whether Kathiawar is British Territory.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subramania Aiyar, Mr. Justice Davies and
Mr. Justice Benson.

Vijiaraghavachariar Petitioner (3rd accused).*

Indian Penal Code, Ss. 43, 153 and 296—Highway—Religious procession—User—
Vadagalais and Tengelais—Vadagalais forming separate goshti—Recital of pra-
bandhams—Illegality—Lawful worship—Disturbance.

Vijiaraghava-
chariar
v.
The Queen.

Where under a decree of the High Court the Tengelais were held entitled as against the Vadagalais to the exclusive right to the Adhyapakam Miras (such as reciting Tamil prabandhams) in the temple of Deepaparakasaswami at Velakadi Koil and in the shrines attached thereto, and the Vadagalais were restrained from interfering with the Tengelais in the recital of the mantram and prabandham otherwise than as ordinary worshippers and while the idol was going in a procession along a highway and the Tengelais goshti was reciting the prabandhams in front of the god, the Vadagalais on the suggestion of the District Magistrate formed themselves into a separate goshti behind the idol and recited prabandhams separately and never desisted from doing so when the Tengelais being informed of this by persons whom they kept to watch the Vadagalais asked them to desist:—

Held by the Full Bench (overruling the Chief Justice and following *Bhashyam Aiyangar, J.*)

- (1) that the act of the Vadagalais was not in contravention of the decree which reserves to the Vadagalais the exercise of their rights as ordinary worshippers;
- (2) that the said act was not "illegal" within the meaning of Ss. 153 and 43 of the Indian Penal Code;
- (3) that the Vadagalais in forming goshti and reciting prabandhams separately could not be said to be acting 'wantonly' or 'malignantly' within S. 153 as they were induced so to act by the action of the District Magistrate;
- (4) that as the two goshtis were a considerable way apart and the Tengelais could hear little or nothing of what was going on in the rear (i. e., of what was being recited by the Vadagalais), there was no "disturbance" of the worship of the Tengelais within the meaning of S. 296, Indian Penal Code, by the mere fact that the Vadagalais recited prabandham (in Tamil) separately without reciting Vedam in Sanskrit.

Per Subramania Aiyar and Bhashyam Aiyangar, JJ:—

- (1) The Tengelais cannot be said to have been engaged in "lawful worship" within the meaning of S. 296 when they were going in a procession in a highway and reciting prabandhams;
- (2) Using the highway as a place of worship or carrying on processions in a highway is not a legitimate user of it as a highway.

Per Arnold White, C. J. and Benson, J:—

It cannot be said that the Tengelais were not lawfully engaged in religious worship within the meaning of S. 296 by the mere fact that they were engaged in it in a highway.

Vijiaraghava-
chariar
v.
The Queen.

Per *Benson, J.* :—

- (1) Using highways for religious procession is a lawful user,
- (2) Even a dedication of the highway with the reservation of rights of persons to go in religious procession may be presumed in India.

Per *Bhashyam Aiyangar, J.*

Such a reservation cannot be presumed but must be proved.

Petitions, under Ss. 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the Sessions Judge of Chingleput in Criminal Appeals Nos. 22 to 24 of 1902, presented against the conviction and sentence passed by the court of the Joint Magistrate of Chingleput in C. C. No. 253 of 1901.

The case first came on for hearing before their Lordships (The Chief Justice and Bhashyam Aiyangar) who delivered the following.

V. Krishnaswami Aiyar and *T. V. Seshagiri Aiyar* for petitioners.

The Public Prosecutor (E. B. Powell) for the Crown.

JUDGMENTS*:—*The Chief Justice* :—These are petitions against convictions for offences under Ss. 153 and 296 of the Indian Penal Code. It appears that on the occasion of the festival of Vedanta Desikar the god of the Velakadi Koil temple is taken in procession through the public streets to the gate of the temple of another deity, a distance of some two miles. It is customary for the Tengalai goshti or assembly to march in front of the god singing a Tamil chant known as the Prabandham, which is a portion of the ritual in which the Vadagalai inhabitants of Conjeevaram as well as the Tengalai inhabitants are entitled to take part, the latter in the capacity of office-holders and as worshippers, the former only in the capacity of worshippers. It is also customary for the Vadagalais to form a goshti behind the god, forming part of the procession and chanting the Sanskrit Vedam. On the occasion in question a body of Vadagalais interposed themselves behind the god and between the god and the goshti engaged in chanting the Sanskrit Vedam and took part in the procession chanting a different portion of the Prabandham from that which was being chanted by the Tengalais who were marching in front of the god. There is no evidence that the Tengalais in front could hear the actual

* 9th December 1902.

words which were being chanted by the Vadagalais behind, but there is evidence that they could hear that Tamil, and not Sanskrit, was being chanted. Certain of the Tengalais left their part of the procession and approached the Vadagalais requesting them to desist. This the latter declined to do. There was no actual disturbance as the police were in attendance, but the police evidence is to the effect that if the police had not been present there would have been a riot. The Vadagalais admit that the introduction into the procession of a separate ghosti for the purpose of reciting the Prabandham is an innovation. On the other hand, the Tengalais concede, as I understand the case, that the Vadagalais are entitled to join forces with the goshti which marches in front of the god for the purpose of taking part in the procession and chanting the Prabandham. Their right to do this, in the capacity of worshippers and of worshippers only, as contradistinguished from office-holders, appears to have been established by the judgment of this Court in S. A. No. 1423 of 1889, in O. S. No. 295 of 1886 instituted in the District Munsif's Court of Chingleput. In the suit of 1886 the Tengalais claimed a declaration of their exclusive right to the Thodakkam and Adhyapakam miras in question, and asked for an injunction restraining the Vadagalais from reciting the Thodakkam, Mantram and Prabandham either jointly with the Tengalais or separately in procession within the temple and outside the Prakaram. The decree declared the exclusive rights of the Tengalais to the Adhyapakam miras with the exception of the Thodakkam, one of the rights of the Adhyapakam miras being declared to be the exclusive right of reciting the usual Tamil Prabandhams in the temple of Deepaprakasaswami at Velakadi Koil and in the shrines attached to it. It was also declared that the Tengalais were entitled to discharge the duties on all occasions on which the ceremony was performed, as well at the time of procession as at services in the temple and its shrines. The terms of the injunction were that the Vadagalais were to be restrained from interfering with the Tengalais in the recital of the Mantram and Prabandham otherwise than as ordinary worshippers. The effect of this, I take it, is to recognize a right in the Vadagalais in their capacity as worshippers, as distinguished from the "exclusive rights" to be enjoyed by the Tengalais as office-holders, which are referred to in paragraph 4 of the decree.

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The question therefore comes to this :—In acting as they did on the occasion in question, did the Vadagalais exceed the limits of their right as “ordinary worshippers” which is recognized by the decree—in other words, did they, as between themselves and the Tengalais, do that which was illegal in the sense that it amounted to a breach of the terms of the injunction to which I have referred. Mr. Krishnaswami Aiyar laid much stress upon the fact that in the suit of 1886 the Court did not allow the injunction to go in the terms asked for by the Tengalais, viz., that the Vadagalais should be restrained from reciting the Prabandham jointly with the Tengalais, or separately in procession within the temple and outside the Prakaram. Now the effect of the decree in the suit of 1886, as I understand it, is that the Vadagalais are entitled to recite the Prabandham either jointly with the Tengalais or separately, either within the temple, or without, if, in so doing, they do not interfere with the Tengalais in their recital of the Prabandham, except in so far as interference is necessarily involved in the exercise by the Vadagalais of their rights as ordinary worshippers. Now, first, was there interference? On the facts found I think there was. If the Vadagalais had been content to form a separate Vadagalai goshti for the purpose of chanting the Prabandham at the rear of the procession, it might have been otherwise. But by interposing themselves immediately behind the god they formed an integral part of the procession. Admittedly this was an innovation. It seems to me that by so interposing themselves and by chanting a different portion of the Prabandham from that in which the Tengalais were engaged in front, in such circumstances that what they were doing came to the knowledge of the Tengalais in front, the Vadagalais interfered with the Tengalais in the recital of the Prabandham. I do not lose sight of the fact that this took place in the public highway. The Vadagalais have of course as much right to use the public highway for the purposes of a religious procession as have the Tengalais. Para. 6 of the decree must no doubt be read by the light of para. 5; but, so reading it, I am of opinion that the effect is to restrain the Vadagalais generally, that is to say whether the procession takes place within the temple or its shrines or without. If this is so, the ordinary rights enjoyed by Tengalais and Vadagalais alike as members of the public, as between themselves and in connection with the matters of controversy

which are incessantly arising between them, are governed by the decisions by which the Courts have from time to time attempted to define their respective rights.

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Then, assuming there was interference, was the interference only that which was necessarily involved in the exercise by the Vadagalais of their rights as worshippers?

The learned Vakil who appeared for the petitioners was unable to inform me whether the taking part in the procession was part and parcel of the ritual of worship or not. If it is not, the Vadagalais cannot claim the benefit of the limitation imposed on the scope of the injunction by the words "otherwise than as ordinary worshippers." Assuming it is, it was open to the Vadagalais to follow the course hitherto adopted—to which as I understand no exception would, or could, have been taken by the Tungalais, viz, to fall in with them in front of the god and join with them in the chanting of the Prabandham. This has hitherto been regarded as a proper and sufficient method of discharging their religious obligations (if any) as "ordinary worshippers" so far as taking part in the procession is concerned. It seems to me that in attempting to assert a right to form a *goshti* of their own for the purpose of the independent recitation of the Tamil Prabandham, in a procession in which the Tungalais were engaged in exercise of their rights as office-holders in reciting the Prabandham, they went beyond their rights as "ordinary worshippers." In a second appeal which came before this Court in 1882 (S. A. No. 969 of 1882) this Court upheld a judgment by the Munsif declaring the right of the defendants to recite the same or different texts separately, provided that they followed at a reasonable distance behind the plaintiffs' *goshti* so as not to interfere with the plaintiffs' recitation. So far as the facts of that particular case were concerned, there may be no reason to question the soundness of the decision, but it affords one no assistance for the purpose of determining whether, on the facts of the case now before the Court, the Vadagalais were within their legal rights in acting as they did. If, as in my view it was, the action of the Vadagalais was "illegal," I find no difficulty in holding that they acted malignantly or wantonly within the meaning of the section.

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On the facts found in connection with the making of Mr. Scott's order—which was issued in connection with a different ceremony—I do not think it can be said that the Vadagalais acted under the *bona fide* belief that the authorities had sanctioned the innovation which they sought to introduce. The evidence shows that provocation was in fact given and I think it must be taken that the Vadagalais knew that such provocation would be likely to cause a riot.

I also think there was "disturbance" within the meaning of this word as used in S. 296, Indian Penal Code and that the Tengalais were lawfully engaged in the performance of a religious ceremony notwithstanding the fact that the ceremony was being conducted in a public highway.

BHASHYAM AIYANGAR, J.—The main facts on which the decision of this case rests are not in dispute and an accurate statement of those facts coupled with a critical examination of the prayers in O. S. No. 295 of 1886 and of the decree therein is sufficient in my opinion to show that the conviction of the 3rd, 7th and 11th accused by the Joint Magistrate which has been upheld in appeal by the Sessions Judge must be set aside as being bad in law.

During the celebrated annual festival at Conjeevaram in June 1901, in connection with the big temple there—which festival commencing on the 30th or 31st May extended over 10 days—, a festival in connection with another smaller temple which is independent of the big one and under the management of separate trustees, took place on the 9th day of the former. This minor festival consisted in the idol of Vedanta Desikar, the deity of the smaller temple, being taken in procession through the public streets over a distance of nearly two miles to the entrance of the big temple and then brought back. The idol was preceded at a short distance by a congregation (*goshti*) of the Tengalai Vaishnava inhabitants of Conjeevaram whose exclusive right to the office of Adhyapaka miras in the said temple has been definitively established by the decree in the said O. S. No. 295 of 1886. They were discharging the duties of that office, to which emoluments are attached, by reciting the Prabandham, after first reciting for a few minutes the Tengalai Mantram. Between them and the idol, in the

procession, there was a passing crowd of devotees and worshippers. Behind the idol, at a distance of about 180 feet from the Tengalai goshti in front, marched a congregation of some Brahmin Vadagalai inhabitants of Conjeevaram reciting the Prabandham. Between this goshti and the idol, there was likewise a passing crowd of worshippers. This goshti in turn was followed by another goshti of some other Vadagalai Brahmins of Conjeevaram reciting the Vedas. The Prabandham is the sacred literature in Tamil consisting of 4,000 stanzas, and the Vedas, the sacred literature in Sanskrit. These two are common to both the Tengalai and the Vadagalai sects. The Tengalai Mantram (in Sanskrit), however, which is short and immediately precedes the recitation of the Prabandham, is peculiar to the Tengelais, just as the corresponding Vadagalai Mantram (also in Sanskrit) is peculiar to the Vadagalai sect, each being addressed to the respective founders of the two rival sects.

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It appears from the evidence of the 2nd prosecution witness—who was Police Inspector in Conjeevaram from 1889-1900—that for some time after 1889, the Tengelais and Vadagalais used to form one goshti jointly reciting the Prabandham in front of the deity, but this having led to a quarrel which resulted in a criminal prosecution and the conviction of some of the Vadagalais in connection with a festival of the big temple, they, since that time, used to form a separate goshti behind the idol and go in procession reciting the Vedas in connection with the festivals of both the big and the smaller temples. But during the annual festival in June 1901, on the occasion in question, some of the Vadagalais for the first time formed themselves into another separate goshti, reciting the Prabandham and followed the idol of Vedanta Desikar when it was taken in procession to the big temple as above described. This new goshti marched between the idol and the old goshti of Vadagalais reciting the Vedas behind the idol. Two of the Tengelais brought this, as an innovation, to the notice of the then Inspector of Police, the 3rd witness for the prosecution, and asked him to prohibit the Vadagalais from reciting the Prabandham. There being no disturbance or rioting, the Inspector of Police did not interfere in the matter. It appears from his evidence that when he was accompanying the Tengalai goshti he could hear only a

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'confused noise of reciting,' that he could not distinguish whether it was Sanskrit or Tamil, that the two Vadagalai goshtis were visible from where the Tengalai goshti was going and that the Tengalais had out-posts to tell them what was going on.

Five or six days prior to this, in connection with the third day festival of the *big temple*, one of the Vadagalai Brahmins, who joined the Tengalai goshti reciting the Prabandham in front of the god, appears to have been arrested, in consequence of which the remaining Vadagalais had to withdraw from that goshti and when this matter was brought to the notice of the District Magistrate who was then present at Conjeevaram and it was represented to him that the Tengalais would not allow the Vadagalais to join with them and recite the Prabandham in peace, the District Magistrate arranged that the Vadagalais should form a separate goshti behind the idol and recite the Prabandham there, so as to avoid any breach of the peace "by the Vadagalais and the Tengalais being close together" by forming one goshti and reciting the Prabandham. This arrangement was after some reluctance on the part of the Vadagalais to forego the honour of being in the procession in front of the deity along with the Tengalais, at last adopted at the procession on the morning of the fourth day of the festival in the presence of the District Magistrate himself and was since then continued throughout the remaining days of the festival of the *big temple*.

The dispute now in question arose on the adoption by the Vadagalais of the same arrangement in the procession in connection with the festival of the *smaller temple* also. The complainant in the case, a leader of the Tengalai party, preferred this complaint to the Joint Magistrate of Chingleput accusing several Vadagalais and one of the trustees of the smaller temple—a weaver by caste—who accompanied the procession in question, of the offences defined by Ss. 143, 153, 296 and 298 of the Indian Penal Code. The Charges under Ss. 143 and 298 were not at all made out but the Joint Magistrate convicted the 3rd and 7th accused under Ss. 153 and 296, Indian Penal Code, and the 11th accused, the trustee, as abettor of those offences, and sentenced each of them to a fine of Rs. 100 and the convictions and the sentences were upheld by the Sessions Judge in appeal.

Upon the above facts, it would, of course, be impossible to sustain the conviction unless the same be warranted by the decree in the said O. S. No. 295 of 1896. That was a suit brought on behalf of the Tengalai Brahmin inhabitants of Conjeevaram against two sections of the Brahmin Vadagalai inhabitants therein, and the Sudra trustees of the smaller temple, to establish the exclusive right of the Tengalai Brahmins to the office of adhyapaka miras (including the Thodakkam) in the temple and to recover arrears of the emoluments of the office. One section of the Vadagalais and the trustees denied the existence of any such office in the temple, while the other section of the Vadagalais claimed the office exclusively for themselves. The prayer in the plaint, so far as it has a bearing upon the present case, was as follows :—

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“(6) plaintiffs pray for a decree declaring the exclusive right of the Plaintiffs and the Brahmins of their sect to the Thodakkam Adhyapaka miras in question, for an injunction restraining the Thathachar and others, Brahmins of the Vadagalai sect, from reciting the Thodakkam, Mantram and Prabandham referred to in the plaint, either *jointly* with the plaintiff's sect or *separately*, or any other Mantram or Prabandham in the *Sannidhis* referred to in the plaint, during the daily and special puja and festivals and in procession within the temple and outside the Prakaram” &c. (The italics are mine.)

The District Munsif in paragraph 36 (2) of his Judgment, after adverting to the injunction prayed for restraining the defendants from reciting the Thodakkam, Mantram and Prabandham either jointly with the plaintiffs or separately or any other Mantram or Prabandham in the temple during the daily and special puja and festivals and in processions within the temple and outside it, states as follows :—

“Clearly the plaintiffs cannot have such an injunction. The defendants may be ordered not to interfere with the plaintiffs in the recital of the Mantram and the Prabandham otherwise than as ordinary worshippers.”

The reservation of the right of the Vadagalais as ordinary worshippers is explained as follows in paragraph 55 of the Judgment:—“It is not denied by the plaintiffs that the Vadagalais are

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entitled to recite the Prabandham in the temples in dispute as ordinary worshippers. Nor have the plaintiffs any right to deny to the Vadagalais their privilege of reciting the Prabandhams as ordinary worshippers". It will be observed that there is no reference here to their reciting the Prabandham as ordinary worshippers only in *conjunction* with the Tengalai goshti or office-holders. The material portion of the decree runs as follows :—

" I declare that

(1) The adhyapaka miras, except Thodakkam of the plaint Deepaprakasaswami temple and the shrines, including Vedanta Desikar's shrine attached to the said temples, belongs exclusively to the Tengalai sect residing at Conjeevaram.

* * * * *

(4) the rights of the Adhyapaka miras are

(i) the exclusive right of chanting the Mantram " Sri Sailesa Dayapatram,"

(ii) the exclusive right of reciting the usual Tamil Prabandhams in the temple of Deepaprakasaswami at Velakadi Koil and in the shrines, including the *Sannidhi* of Vedanta Desikar, attached to it.

(5) The Tengalais are entitled to discharge the duties on all occasions, in which the ceremony is performed, as well at the time of procession as at services in the said temple and its shrines.

(6) I order that an injunction be issued to the Vadagalais and Thathachars, defendants, enjoining them to abstain from interfering with the Tengalais in the recital of the Mantram and Prabandham, otherwise than as ordinary worshippers."

There was a similar dispute between the Tengalai and Vadagalai Brahmins of Conjeevaram, in regard to the office of Thodakkam and Adhyapaka miras in the *big temple*, which had previously been decided in 1882, on substantially the same lines, in the case of *Krishnasami v. Krishnama*.¹

The conviction under S. 153, Indian Penal Code, can be upheld only if the accused in forming themselves into a separate goshti

1. I. L. R. 5 M. 313.

on the highway and reciting the Prabandham, behind the idol, when it was taken in procession on the day in question, acted 'illegally', 'malignantly or wantonly' and thus gave provocation to the Tungalai goshti, intending or knowing it to be likely that such provocation would cause the offence of rioting to be committed. Having regard to the antecedent relations between the two rival sects, there can be no doubt that if the action of the Vadagalais were illegal, they ought to have known that it was likely to provoke the Tungalais and to lead to a breach of the peace. The two questions, therefore, which have to be considered in connection with the charge under S. 153, Indian Penal Code are (i) whether the Vadagalais acted "illegally" in forming themselves into a separate goshti and reciting the Prabandham on the above occasion and (ii) whether such action was 'wanton' or 'malignant.'

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Both the Joint Magistrate and the Sessions Judge apparently assume that the injunction extends to processions outside the temple and also to the Vadagalais reciting the Prabandham *separately* and that the decree permits the Vadagalais only to *join* the Tungalai goshti and recite the Prabandham along with them. The Joint Magistrate in construing that portion of the decree which restrains the Vadagalais from interfering with the Tungalais, in the recital of the Mantram and the Prabandham, otherwise than as ordinary worshippers, says that the words ('ordinary worshippers') 'must be construed very literally and that can only be by assuming that what is meant is that the Vadagalais, if they *join* at all in the Tamil recitation, can do so only by *joining* with the Tungalai goshti and singing with them.' (The italics are mine.) The Sessions Judge also concurs in this view and holds that if the Vadagalais wish to recite the Prabandham they must go along with the Tungalais and recite, as ordinary worshippers, the same portion of the Prabandham that the Tungalais are reciting and that they cannot be regarded as reciting the Prabandham as ordinary worshippers if they form a separate goshti of their own in a different part of the procession and recite a different portion of the Prabandham as they are proved to have done in the present case. This view proceeds altogether on a misconstruction of the decree in question and a misapprehension of the expression 'ordinary worshippers' occurring therein. A breach of an injunction contained in

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a decree of a competent Civil Court, is no doubt, 'illegal' (S. 43 Indian Penal Code), but it must be clearly made out that the act complained of is prohibited by the decree; and this is specially so, when, as in the present case, it is sought to bind by the decree persons who were not actually parties thereto, but were only constructively represented therein. It will be seen from the extracts given above that the plaintiffs in O. S. No. 295 of 1886 prayed for an injunction restraining the Vadagalais from reciting the Prabandham either *jointly* with the plaintiffs' sect or *separately*, during the daily and special puja and festivals and in processions within the temple and outside the temple, but that the decree only declared the exclusive right of the Tengalais to discharge the duties of the office of Adhyapaka miras, on all occasions in which the ceremony is performed, as well at the time of procession as at services in the said temple and its shrines and enjoined the Vadagalais to abstain from interfering with the Tengalais in the recital of the Mantram and the Prabandham, otherwise than as ordinary worshippers. (The italics above are mine.) It seems to me, therefore, perfectly clear that the plaintiffs' prayer that the Vadagalais be restrained from reciting the Prabandham separately—either individually or in a goshti—was not granted and must therefore, under explanation III to section 13, C. P. C. be taken to have been refused. As regards the other prayer, *i. e.*, that the defendants be restrained from reciting the Prabandham jointly with the plaintiffs, that was granted only with a substantial qualification, *viz.*, that as ordinary worshippers they may interfere and join with the Tengalais in the recital of the Mantram and the Prabandham and such qualification was engrafted upon the injunction notwithstanding that the exclusive right of the Tengalais to the office of Adhyapaka miras was established and declared by the decree. The office-holders, therefore, in a body or goshti, chant the Prabandham in discharge of their duties in the performance of the services and are exclusively entitled to the emoluments appertaining to that office. Instead of the Vadagalais, whose right to the office (except to that of Thodakkam) was negatived by the decree, being absolutely restrained from *interfering* with the Tengalais by joining them and jointly chanting the Prabandham with them, while the latter were discharging the functions of their office, the decree unfortunately allowed them to

interfere as ordinary worshippers, thereby implying that they might take part in the discharge by the Tungalais of the functions of their office of Adhyapaka miras, but merely as ordinary worshippers, or volunteers not entitled to a distributive share along with the office-holders in the emoluments of the office. The office-holders, as may have been expected, naturally resent such intrusion and the complainant at the conclusion of his evidence in the present case states as follows :—

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“The Vadagalais can join our goshti with our permission. If we don't give permission, they cannot come. If they join as ordinary worshippers we should not object; but they must not repeat anything that we don't.”

The result therefore has been that when, at the beginning, the Vadagalais used to form one goshti with the Tungalais there were, as might have been expected, breaches of the peace, and in consequence the Vadagalais used to form a separate goshti behind, chanting the Vedas or Sanskrit prayers. But on the occasion in question they also formed another goshti chanting separately the Prabandham. This goshti being separate from the Tungalai goshti in front of the idol, and at a distance of about 180 feet, each goshti would not hear what was being recited by the other; and the evidence is that, at the same time, the two goshtis were chanting different stanzas of the Prabandham. There is nothing whatever in the decree to prevent the Vadagalais of Conjeevaram, either individually or in a goshti, from reciting the Prabandham separately from and quite independently of the office-holders. Whether they do so jointly with, as apparently permitted by the decree, or separately from the Tungalai goshti of office-holders, in either case, they do so and can do so only as ordinary worshippers who can claim no share in the emoluments attached to the office of Adhyapaka miras. If, as admitted, they have committed no breach of the injunction, by forming themselves into a separate goshti and reciting the *Vedas*, while the Tungalai goshti in front of the idol was chanting the Prabandham, it is difficult to conceive how the Vadagalais contravene the terms of the injunction by forming themselves into a separate goshti and reciting the *Prabandham*. Both the Joint Magistrate and the Sessions Judge seem to consider that the Vadagalais cannot be regarded as ‘ordinary worshippers’ unless

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they interfere with the Tengalai goshti and join it in reciting the Prabandham. This is based altogether on a misapprehension of that expression in the decree. The Brahmin Tengalai inhabitants of Conjeevaram have an interest in the temple, not only as worshippers or devotees like the Vadagalais, but also as office-holders of the Adhyapaka miras. The expression 'ordinary worshipper' is used in the decree as it was already used by the High Court in the case reported in *Krishnasami v. Krishnama*¹ in the sense of a person who is interested in the temple as a mere worshipper or devotee as distinguished from one entitled to any office therein and carrying on worship in discharge of the functions of that office. The Vadagalai Brahmins, who either individually or in a body recite the Prabandham, the Vedas or any other hymns, do so only as "ordinary worshippers" and they can be neither more nor less than such when they recite the Vedas or the Prabandham separately from the Tengalai goshti.

On the grounds, therefore, that the extravagant prayer made in the plaint—that the Vadagalais should be restrained from reciting the Prabandham *separately* from the Tengalai goshti—was not granted, that within the meaning of the decree, the Vadagalais in reciting the Prabandham separately from the Tengalai goshti interfere with the Tengalai goshti if it is an interference at all, only as ordinary worshippers, in which capacity they are permitted by the decree to interfere with the Tengalais in the recitation of the Prabandham, and that there is nothing whatever in the decree to warrant the assumption that the Vadagalais can, as ordinary worshippers, recite the Prabandham only by *joining the Tengalai goshti* and reciting the Prabandham along with them, I am decidedly of opinion that the act complained of is not illegal within the meaning of Ss. 153 and 43 of the Indian Penal Code (see also *Queen Empress v. Kahanji*².)

I am also of opinion that the action of the Vadagalais cannot be regarded as "malignant" or "wanton" within the meaning of S. 153, having regard to the fact that such action was in pursuance of the arrangement which was introduced by the District Magistrate about the same time, in connection with the processions of

1. I. L. B. 5 M. 313.

2. I. L. B. 18 Bom. 758.

the idol of the *big temple*, in view to avoid friction between the two sects and consequent breach of the peace. Technically no doubt the District Magistrate's sanction had reference only to the processions connected with the *big temple* and it could not be relied upon as a *bar* to the prosecution if the action of the accused, in reference to the procession of the deity of the *smaller temple*, were otherwise illegal. But it has an important bearing on the question as to whether the action of the accused in forming a separate goshti and reciting the Prabandham—which is not repugnant to the Tengalais—was “malignant” or “wanton.” The rival sects interested in both the temples are the same and their respective rights, so far as the question under consideration is concerned, are identical in respect of both the temples and the same have been declared and settled in substantially the same terms though by decrees passed in two different suits. The action of the District Magistrate who was present at the spot on the occasion of the annual festival of the *big temple* was in my opinion very proper and eminently calculated to preserve peace between the rival sects and he rightly declined to change the arrangement introduced by him. The Vadagalais must therefore be regarded as having acted in perfect good faith and not “malignantly” or “wantonly,” when during the same festival, though in connection with the *smaller temple*, the deity of which was being taken in procession to the *big temple*, they adopted the same arrangement of forming a separate goshti behind the idol, reciting the Prabandham.

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The question, however, not having been raised, I do not pause to consider whether paragraph 5 of the decree can rightly and reasonably be construed as in any degree granting the prayer in the plaint as to processions *outside* the temple—especially as neither the local authority in whom the public streets are vested nor the owner of the freehold in the soil thereof was represented in the suit.

The conviction under S. 296, Indian Penal Code, is equally unsustainable. The Joint Magistrate says that though the two goshtis were a considerable way apart and the Tengalais in front could hear little or nothing of what was going on in the rear, beyond perceiving that the Vadagalais were chanting in Tamil, yet

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he must hold that the worship by the Tungalais was disturbed, because the fact that two or three of the Tungalais went back and remonstrated with the Vadagalais shows that their mind was disturbed. The Sessions Judge too finds that there was a disturbance because "the assembly of persons lawfully engaged in the performance of religious worship is the unit and the assembly is said to be disturbed when some particular members of it are disturbed" and 'one of the Tungalais actually went back and took down the names of some members of the Vadagalai goshti on a piece of paper.' In my opinion, the facts as thus found cannot legally amount to voluntarily causing disturbance to an assembly lawfully engaged in the performance of religious worship or religious ceremonies and I presume that the Joint Magistrate and Sessions Judge would not have convicted the accused under S. 296 but for their having arrived at the conclusion with reference to the charge under S. 153, that the action of the Vadagalais in forming themselves into a separate goshti reciting the Prabandham was illegal, being in contravention of the decree in O. S. No. 295 of 1886. If their action was not illegal, there is no more reason, under the circumstances (see S. 79 Indian Penal Code), for convicting the accused of the offence under section 296 than there would be for convicting the Tungalais for disturbing the Vadagalai goshti, which, like the Tungalai goshti, was engaged in the performance of religious worship. In a recent case before this Court (Criminal Revision Case No. 151 of 1902) in which in connection with a procession relating to the big temple, a Vadagalai Brahmin was convicted under S. 296, but the conviction was quashed in revision by a Bench of this Court of which I was one of the members, on the ground that the facts as found by the Magistrate did not amount to a disturbance within the meaning of S. 296, it was observed that 'in the decision of such sectarian disputes and cases, public streets or highways cannot in law be regarded as temples or places of worship belonging, or dedicated for the time being to the votaries or the communities concerned, simply because a customary religious procession is passing over a public street or highway' and I adhere to the opinion therein expressed. Within the meaning of S. 296, Indian Penal Code, no assembly can, in my opinion, be lawfully engaged in the performance of religious worship or religious ceremonies on a *highway*

unless it be established or can be reasonably presumed that the dedication of the highway was subject to such restriction and user. Otherwise persons riding on horses or driving in vehicles at the time and thereby effectually disturbing the worship by interrupting or suspending the same will be liable to conviction under S. 296, Indian Penal Code. In a country where there are so many rival sects and religions intolerant of one another, it will be impossible to presume a dedication of a highway by members of one sect or religion for religious processions or worship to be conducted on such highway by followers of other rival sects and religions. If it be asked what the ancient common law of India was as to the use of public streets and highways by different races, castes and outcastes and as to their use for religious and other processions by various sects, the answer would obviously be one which according to the law as administered by the British Courts could not be tolerated for a moment. Using the highway as a place of worship is not the legitimate user of it as a highway 'for the purpose of using it in order to pass and re-pass or for any reasonable or usual mode of using the highway as a highway' [*Harrison v. Duke of Rutland*¹; *Hickman v. Maisey*²] and the conversion of the highway, though but temporarily, into a place of sectarian worship, amounts in law to a trespass upon the freehold in the soil of the highway and in cases in which there is a statutory vesting of the highway in a local authority also to a trespass upon the highway itself *Harrison v. Duke of Rutland*³; *Hickman v. Maisey*⁴; *Reg. v. Pratt*⁵; *Reg. v. Graham and Burns*⁶; *Rex v. Carlile*⁷. It does not follow that the use of highway for a purpose which does not amount to an indictable offence is necessarily lawful. If the user is for a purpose which amounts to a trespass (civil) on the freehold in the soil, it is unlawful as was held both in *Harrison v. Rutland*¹ and *Hickman v. Maisey*². These two recent English cases are very

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1. L. R. (1893) 1 Q. B. 142, at p. 146.
2. L. R. (1900) 1 Q. B. 752, at pp. 757—8: see also Dicey's Constitutional Law (4th Edition) at p. 430.
3. (1893) 1 Q. B. at pp. 146, 147 and 151.
4. (1900) 1 Q. B. at p. 755.
5. 4 E. & B. 860; 24 L. J. M. C. 113.
6. 4 Times Law Rep. (1888) 212 at p. 226.
7. 6 Car. and Pay, 626.]

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instructive on the question of what constitutes a reasonable use of a highway as such and the principles therein enunciated will have an important bearing on the decision of questions that often arise in this country as to the user of a highway by particular sects for religious, devotional and similar purposes. No doubt in every country and particularly in this country highways are by sufferance used for purposes which are decidedly in excess of their legitimate and reasonable use as a highway—especially when such use has been customary—and the same is tolerated and no notice is taken of the trespass thus committed on the highway and the freehold in the soil, so long at any rate as such use of the highway does not cause any special or serious inconvenience or obstruction. In *Ex parte Lewis*¹, *Wills, J.*, in holding that ‘a claim on the part of persons so minded to assemble in any numbers and for so long a time as they pleased to remain assembled upon a highway (Trafalgar Sq.) to the detriment of others having equal rights, is in its nature irreconcilable with the right of free passage’ and that there is ‘no authority whatever in favour of it’ observed as follows:—“Things done every day in every part of the kingdom without let or hindrance, which there is not and cannot be a legal right to do and not infrequently are submitted to with a good grace because they are in their nature incapable, by whatever amount of user, of growing into a right.” These remarks of *Wills, J.*, apply with peculiar force in this country to a large and increasing class of religious, sectarian and other similar processions, to preaching on highways and to the common use of public streets and highways by occupants of houses abutting on the same, for various purposes connected with the weaving and other industries and for drying paddy and other grains and for similar purposes. But doing a thing by sufferance is one thing and claiming it as lawful and invoking the aid of the executive authority to do it, as of right, is quite another thing.

On the grounds, therefore, that there was neither in law, nor in fact, any disturbance of the Tengalai goshti, that if the Tengalai goshti can be lawfully regarded as engaged in the performance of religious worship or religious ceremonies, on the highway, on the occasion in question, the Vadagalai goshti was equally lawfully engaged in the performance of religious worship on the same

occasion, but that in my opinion neither assembly can be regarded as lawfully engaged in the performance of religious worship on a highway which it is not alleged or shown was dedicated as a highway subject to such restriction and user, I think the conviction under S. 296, Indian Penal Code, should also be quashed.

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So far as the conviction of the 11th accused as an abettor is concerned, it is, in my opinion, clearly wrong. The case against him is simply that as the Sudra trustee of the temple "he was a man in authority" and was conducting the procession and that he made no attempt to stop the formation of the separate goshti, but rather encouraged it. The Sessions Judge in appeal says nothing specially about the 11th accused. In my opinion the conviction of the 11th accused as an abettor is in any event entirely unwarranted and ought to be set aside.

In consequence of the difference of opinion between the Honourable the Chief Justice and the Honourable Mr. Justice Bhashyam Iyengar, the case was referred to a Full Bench consisting of Subramania Aiyar, Davies, and Benson, JJ.

T. V. Seshagiri Aiyar for petitioners.

The Advocate-General (J. E. Wallis). *The Public Prosecutor* (*E. B. Powell*) for the Crown.

JUDGMENTS :—SUBRAHMANIA AIYAR, J.—It is necessary first to consider the charges against the 3rd and 7th accused, whom the 11th accused has been charged with abetting.

Taking up the charge under S. 153 of the Indian Penal Code, the question on which practically the case turns is whether the recitation by the two accused during the procession in question of Prabandhams or Tamil hymns was illegal, not on the ground that it was against any usage of the institution, but with reference to the decision in O. S. No. 295 of 1886 in the District Munsif's Court of Conjeevaram. That decision only declared that the Tengalais were entitled to the Office of Adhyapakam, and in that capacity, as usual to recite the Prabandham on all the prescribed occasions of worship, without let or hindrance by the Vadagalais. It did not in the least affect the rights of the Vadagalais as ordinary worshippers. Having regard to the fact that that suit was entirely in relation to an office, it must, even if the decision had been silent as to the rights of the Vadagalais as ordinary worshippers, not office-holders, be taken that such rights were left untouched ;

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but the decision is not silent on the matter. It in express terms refers to and preserves the rights of the Vadagalais, as ordinary worshippers, to recite the Prabandhams even in the company of and jointly with the office-holders, whose duty it is to recite them on such occasions. The attempt on behalf of the prosecution to construe this reference in the decision to the right of the Vadagalais to so join in the recitation, as a declaration that the Vadagalais are disentitled from reciting except in conjunction with the office-holders is on the face of it untenable. The Tengelais as Adhyapakars are subject to a duty to recite Prabandhams the performance of such duty entitling them to the emoluments of the office. They cannot, in consequence of their being Adhyapakars, claim an exclusive right to recite them and as the recitation of Prabandhams is a recognised form of worship both with the Vadagalais and the Tengelais, every Vadagalai must *prima facie* be held entitled to recite them by way of worship otherwise than in conjunction with the office-holders. No doubt, if the Vadagalais join the office-holders at the recitation on occasions of worship, it stands to reason that they should do so without in any manner interfering with the due recitation by the office-holders. In such circumstances the office-holders would be entitled to insist that the Vadagalais should recite only those hymns which they themselves were reciting, as otherwise they would be interfered with in the due discharge of their duties. But there is nothing to prevent a Vadagalai by himself or Vadagalais in a body reciting the Prabandhams separately from the office-holders and in doing so reciting verses different from those which the Adhyapakars may be reciting, provided that that is done without interference with the Adhyapakars.

Such being the rights of the Vadagalais, did the accused on the occasion in question interfere with the office-holders by the recitation complained of? Clearly not. Admittedly, the parties were at that time at a distance of 150 feet from each other. Between them stood the body of tom-tom beaters doing their part of the work and those who carried the idol, as well as the motley crowd which assembles at these festivals. Having regard to the bustle and confusion inevitable on such occasions, it is impossible for the office-holders to have heard anything of the recitation by the accused. This is almost conclusively proved by the fact that

the office-holders had to send out persons to ascertain whether any recitation by the Vadagalais was taking place. It must consequently be held that the accused did not interfere with the office-holders, by reciting Prabandhams as they did, and that they were not therefore guilty of any illegal act so as to bring them within the purview of section 153.

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The charge under section 296 of the Indian Penal Code may now be examined. Presumably the object of the section is to secure freedom from molestation when people meet for the performance of acts which ordinarily take place in some quiet spot vested for the time in the assembly exclusively, and one cannot but feel serious doubts as to whether that section was intended to secure to persons who choose to engage in worship in an unquiet place open to all the public as a thoroughfare the immunity from disturbance due to those who meet to worship in a church, a mosque, or temple or other place appropriate for such a purpose.

Turning to the language of the provision, it is clear that the persons assembled are given a right in their collective capacity. What is thereby constituted as offence has no necessary reference to the individuals forming the assembly and a disturbance punishable under the section may result from acts which involve no violation of their personal rights. The precise point for determination is whether the Tengalais on the occasion in question were an assembly lawfully engaged in religious worship within the meaning of the section, and having regard to the fact that they were then on a highway, an affirmative answer to the question would assume that a procession on a highway has a specific legal character and that the members of the procession have a right to use a highway as a place of religious worship.

Are these assumptions well founded? In the discussion of these questions it is scarcely necessary to point out that we should not proceed on the supposition that processions are social phenomena peculiar to this country and consequently that the rule to be laid down in cases like the present must necessarily be different from what prevails in other countries. inasmuch as such a supposition would be incorrect. In the words of the judgment in *In the matter of Frazer*¹ "It has been customary from time immemorial in

1. 63 Mich. 396 ; 6 Amer. Ref. 311.

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all free countries and in most civilized countries for people who are assembled for common purposes to parade together by day or reasonable hours at night with banners and other paraphernalia and with music of various kinds. These processions for political religious and social demonstrations are resorted to for the express purpose of keeping up unity of feeling and enthusiasm and frequently to produce some effect on the public mind by the spectacle of union and numbers. They are a natural product and exponent of common aims and are valuable factors in furthering them.”¹

With these prefatory remarks let us proceed to examine what are the fundamental legal principles underlying the use of a highway by processions. Such principles, it is obvious, must be essentially the same as those on which the analogous so-called right of the public to use public places for holding meetings must rest, and which have been most carefully examined by Professor Dicey. His observations apply with equal force here. The learned author thus points out the fallacies of the ordinary conceptions on the subject:—“The notion that there is such a thing as right of meeting in public places arises from more than one confusion or erroneous assumption. The right of public meeting—the right of all men to come together in a place where they may lawfully be for any lawful purpose * * is confounded with the totally different alleged right of every man to use for the purpose of holding a meeting any place which in any sense is open to the public. The two rights, did they both exist, are essentially different and in many countries are regulated by totally different rules. It is assumed again that squares, streets or roads which every man may lawfully use are necessarily available for the holding of a meeting. The assumption is false. A crowd blocking up a highway will probably be a nuisance in the legal, no less than in the popular, sense of the term, for they both interfere with the ordinary citizen’s right to use the locality in the way permitted to him by law.”² The learned author’s exposition of the true legal aspect of meeting in those places is as follows:—“The right of assembling is nothing more than a result of the view taken by the Courts as to individual

1. 6 Amer. Rep. at 315.

2. Dicey’s Law of the constitution 4th Edn. 430,

liberty of person and individual liberty of speech. There is no special law allowing *A*, *B*, and *C* to meet together either in the open air or elsewhere for a lawful purpose, but the right of *A* to go where he pleases so that he does not commit a trespass and to say what he likes to *B* so that his talk is not libellous or seditious, the right of *B* to do the like, and the existence of the same rights of *C*, *D*, *E*, and *F* and so on *ad infinitum* leads to the consequence that *A*, *B*, *C*, *D* and a thousand or ten thousand other persons may (as a general rule) meet together in a place where otherwise they each have a right to be for a lawful purpose in a lawful manner."¹ Interference with a lawful meeting will therefore not be, to use the words of the same writer, "an invasion of a public right, but an attack on the individual rights of *A* and *B*, and must generally resolve itself into a number of assaults on definite persons, members of the meeting. A wrong-doer who disperses a crowd is not indicted or sued for breaking up a meeting, but is liable (if at all) to a prosecution or an action for assaulting *A*, a definite member of the crowd."

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Another learned writer, Justice Collett, in his comments on the Indian Penal Code, takes the same view and in addition puts processions on a highway on precisely the same footing as public meetings. His observations are as follows:—"It may be convenient here just to notice the popular error that there is some such a right as to hold a meeting in a public place or to move in procession along public streets. There can, in truth, be no such right other than or apart from that of each individual to pass and re-pass in a public place and therefore no right of public meeting or procession (however lawful the purpose) in any sense paramount to general convenience * *. Apart from all express law there can *ex natura rei* be no such right as to hold meetings or to move in procession in public places"²

Before passing to another authority bearing on the present question, it is perhaps well to point out that the alleged right of procession must not be confounded with a reasonable interruption limited as to time such as that caused by fairs and markets, subject to which interruption a dedication of a highway may lawfully be made. The alleged right of procession suggests a right on the

1. Dicey's Law of the constitution p. 258.

2. Collett on the Indian Penal Code 235, 236.

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part of as many of His Majesty's subjects as may be so disposed, to occupy a highway whenever and so often as they may wish for a procession, or possibly for more than one procession to be conducted by persons of conflicting views and sympathies, beliefs and opinions. That such a right cannot be rested on dedication as at present known to the law follows from what was said by *Will and Grantham, JJ.* in *Ex parte Lewis*¹ with reference to the alleged right of meeting. The learned Judges say: "We were informed by Mr. Lewis that there was no statute conferring or recognising such rights. He alleged that they rested upon dedication. It is, however, a species of dedication at present unknown to the law and of which there is no trace in our law books. The only dedication in the legal sense that we are aware of is that of a public right of passage of which the legal description is a right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and re-pass without let or hindrance."

Upon the authorities I have thus referred to, it is perfectly clear that, in the eye of the law, a procession as such has not any specific legal character and that the only rights claimable by those constituting a procession on a highway are what appertain to them as individuals using the highway. Such right is to pass and re-pass, allowing these words the largest possible construction with due reference to all the exigencies of the public. No doubt, many acts may be done on a highway by persons using it which though not strictly passing and re-passing would yet be in the nature of incidents to such passing and re-passing. Though it would not be easy to enumerate them exhaustively and precisely, yet there can be no difficulty generally in drawing the line between what is so incidental and what is not, for nothing can be treated as so incidental which is inconsistent with, in the words of Collins, L. J., "the paramount idea that the right of the public is that of passage"—*Hickman v. Maissey*². But in no view can it be held that the doing of anything so altogether foreign to that paramount idea as the carrying on of religious worship on a highway is a proper incident to the right of passage even according to the most extended notions that can reasonably be entertained of that right. Though ordinarily it would, no doubt, be difficult to hold that

1. 21 Q. B. D. 191.

2. (1906), 1 Q. B. 757.

persons passing along a highway [appropriate it for purposes of worship merely by doing such equivocal acts as singing hymns and the like, yet this case presents no difficulty, inasmuch as here the prosecution case itself is that what the Tengalais were doing on the occasion in question did constitute religious worship and it is impossible to avoid the conclusion that such user of the highway was altogether wanting in lawfulness.

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The soundness of this view is supported not only by decisions in cases where the question of lawfulness arose with reference to the owner of the freehold, but also by decisions in cases where such question arose with reference to the liability of those who were bound to maintain a highway in a proper state of repair but who had neglected to do so. *Stinson v. City of Gardiner*¹ cited in *Bevan on Negligence* (p. 431) is a leading decision on the point. The law as to the proper use of a highway was there laid down in the following terms:—"All persons have the right to pass and re-pass upon public roads so long as they violate no laws for the common good or for the protection of individuals. Within these restrictions they are entitled to the use of the highway for the purposes of travel whether the object of that travel is business or pleasure, whether they pass on foot, with carriages or in the various modes which each individual may choose to adopt. Any part of the highway may be used by the traveller and in such direction as may suit his convenience or taste provided he therein conforms to all laws and well-settled rules connected with such use. Children are not restricted in passing and re-passing upon the streets and roads more than adults. And the same rules are to be applied equally to all in regulating the use of highways for the objects designed." And notwithstanding the broad view thus taken of the law it was held that "when children appropriate a part of the road for their sports and cease to use it as a way for travel, the town or city through which the way passes is not responsible for injuries which may be received by any of the children so engaged although the injuries may take place through a defect in the road." And as at the trial of the case the Judge has refused to instruct the Jury that if the plaintiff, a child, had at the

1. 42 Maine 248; S. C. 66 Amer. Dec. 281.

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time of the accident been using the highway as a play-ground, and not as a traveller, she could not recover, a new trial was granted on the ground that if, as alleged, she had been using the road as a play-ground and not as a traveller, the use for purposes of travel must be regarded as entirely suspended and that she had been using the ground for an object altogether different from that contemplated by the statute which imposed on the city the liability to maintain the road in repair. Precisely the same decision was given in *Blodgett v. City of Boston*¹. And in *McCarthy v. Portland*² it was held that a person using a highway wholly for the purpose of horse-racing could not recover for injuries happening to him because the town did not afford him and his horse a safer and more perfect track. In *Vosburg v. Moak*³ also cited in Beven p. 126, it was held that where a number of persons were playing a game of cricket on a highway and the ball hit a passer-by not only the particular individual who sent the ball, but all the persons engaged in the play were liable in damages as joint tort-feasors, inasmuch as they combined in using the highway for a purpose foreign to the appropriate user of the same.

Compare *Truro Corporation v. Row*⁴ where the mere fact of the defendant marking off a part of the foreshore for depositing oysters dredged by him in deep water, and claiming property in the oysters deposited therein was held to have rendered his user of the foreshore in excess of the right accorded to every subject to use the foreshore for the purpose of fishing.

To guard against any misconceptions arising with reference to the view adopted by me, I would observe that, upon the principles already expounded, processions *per se* are quite unobjectionable and that, as rightly decided in the American Case of *S. v. Hughes*⁵ "a peaceable procession in the streets of a town if lawful and if the streets are not obstructed more than is ordinarily the case

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1. 8 Allen 241 cited in note at 66 Amer. Dec. 284.
 2. See same note.
 3. 1 Cush. 453; S. C. 48 Amer. Dec. 613.
 4. (1902) 2 K. B. 709.
 5. 70 Penn. 86; S. C. 10 Amer. Rep. 669.

under such circumstances is not an indictable offence on the part of the members composing it." The cases cannot, in my opinion, be taken to lay down anything more.

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I may further observe that even when the members of a procession transgress the limit of lawful user of a highway as by setting up an untenable right to carry on worship there, they are not necessarily guilty of a common nuisance, for to be indictable there must be much more than a user not lawful. Though authority may scarcely be necessary for such an obvious proposition I may quote a few lines from *Fairbanks v. Kerr*¹ as there allusion is made, by way of illustration, to the very user in question here. *Agnew, J.*, said : " A street may not be used in strictness of law for public speaking, even preaching or public worship, but it does not follow that every one who speaks or preaches in the street or who happens to collect a crowd there by other means is, therefore, guilty of the indictable offence of nuisance. His act may become a nuisance by his obstruction of the public highway, but it will not do to say it is a nuisance *per se*. This statement, which I adopt as perfectly correct, must be sufficient to repel the idea that every user of a highway, such as that in question here, could be interfered with without reference to the question of a real nuisance having been caused thereby (as to some of the considerations governing the determination of which see *Original Hartpool Collieries' Co. v. Gibb*,² and *Attorney-General v. Sheffield Gas Consumer's Co.*³). So long as that is not the case the authorities should and would treat the matter in the spirit in which *Cozens-Hardy, J.*, viewed the case of the clergymen who set up a right to deliver sermons to the public on the foreshore. Though upon the authority of *Blundell v. Catterall*¹ where it was held that, according to the common law the public at large having the right to go on the foreshore for two purposes only, *viz.*, navigation, commerce, etc., and for fishing, they could not go there for the purpose of bathing, the right set up by the clergymen was negatived, yet an injunction against him was refused for reasons thus humourously expressed by the learned Judge : " There are persons who derive satisfaction from listening to the addresses and the

1. L. R. 5 Ch. D. 713 at 721.

2. 3 Dec. M. and G. 304 at 339.

3. 5 B. and A. 268 ; S. C. 24 R. R. 353.

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defendant derives satisfaction from delivering these addresses. I cannot conceive why they should be deprived of their innocent pleasure." *Llandudno Urban District Council v. Woods*.¹

But it is one thing thus to take an indulgent view of the matter, and quite another to treat the members of a religious procession on a highway as an assembly *lawfully* engaged in worship there for the purpose of fixing criminal responsibility on others under S. 296 of the Indian Penal Code on the extraordinary ground that they were similarly engaged there and in the teeth of the rule that all His Majesty's subjects have in respect of a highway equal rights.

My conclusions on this part of the subject may be put shortly thus. There is no peculiar right known to the law as a right of procession; though the law accords to members of a procession no recognition in their *collective* capacity, yet the fact that a number of persons use a highway together for some common purpose does not detract in any way from such use being lawful; but as the circumstances attending a procession may, in consequence of their being inconsistent with the paramount idea of passage already referred to, be of such a character as to render the user by the processionists otherwise than lawful and as carrying on worship on a highway is of that character, it cannot be affirmed that the Tengelais on the occasion in question constituted an assembly engaged in worship *lawfully* within the meaning of section 296 of the Indian Penal Code.

The result is that the charges against the 3rd and 7th accused under both sections fail and with them those against the 11th as abettor.

Before concluding it seems but right to observe that one specially objectionable feature of this case is that the accused have been convicted and punished for acting in obedience to, or, at all events, in the spirit of, the District Magistrate's order passed in connection with a festival in the principal temple of the place, which was going on at the same time, whereby the Vadagalais were prohibited from joining the Tengelais in the recitation, but were allowed to recite separately—an order evincing judgment and

1. (1899) 2 Ch. 705.

discretion, inasmuch as whilst it prevented collisions between these rival sects, it secured to them both the opportunity of worshipping peaceably.

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I would, therefore, reverse their conviction, set aside the sentences passed on them and acquit them. The fines, if levied, should be refunded.

DAVIES, J.—Taking the facts to be as found, namely, that the Vadagalais joined the procession in a separate goshti or group and recited one portion of the Prabandham in Tamil while the Tengalais in front were reciting another portion also in Tamil, and that this action of the Vadagalais was an innovation, it seems to me that they committed neither of the offences charged against them nor any other offence.

To constitute an offence under section 153 of the Penal Code the Vadagalais must have been acting illegally and also with the intention of provoking a riot. On the first point the case for the prosecution is that the Vadagalais were acting illegally in that they were disobeying the injunction of a Civil Court. But on reading the judgment and decree of the Civil Court referred to, I can find no injunction prohibiting the Vadagalais from doing what they did. On the contrary I find that the particular prayer of the Tengalais that the Vadagalais should not be allowed to recite the Prabandham either jointly with or separately from the Tengalais, that is that, the Vadagalais should not be allowed to recite the Prabandham at all, was expressly refused. While the exclusive right of the Tengalais to the emoluments attached to the performance of the service of recitation was declared, the right of the Vadagalais to recite the Prabandham “as ordinary worshippers” was recognized and was reserved to them. No attempt was made to define their rights as ordinary worshippers. It was not laid down that they must worship singly or by twos or by threes and not in a large group, nor that they must march together with the Tengalais and not separately, nor that they might not utter Tamil—these being matters of ritual which are beyond the province of a Civil Court to determine. Therefore, it cannot be said that the Vadagalais in the present instance exceeded their rights as ordinary worshippers and consequently they did not act “malig-

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nantly or wantonly by doing anything which is illegal." Of course if they, being five or more, had attempted to enforce their rights by means of criminal force or show of criminal force, they would have been amenable to the criminal law, but they did nothing of the kind here. Now comes the second point, that is, whether they were intending to provoke a breach of the peace, and in regard to this I must also hold them to be innocent. By separating themselves from the Tenggalaïs and going far behind them with the idol between, they were only following the directions of the District Magistrate in respect to a similar procession carried on at about the same time and place for the express purpose of preventing a breach of the peace. So that the conviction for the offence under section 153 of the Penal Code entirely fails.

As to the other offence under section 296 of the Penal Code, disturbing a religious assembly, the case for the prosecution is that the recital by the Vadagalais disturbed the recital by the Tenggalaïs by, it would seem, the noise if made, but the facts show that this could not have been the case. In the first place a certain amount of noise is of the essence of these street processions of a deity. It is not alleged that whatever the noise was the Vadagalais that made it drowned all other noises, and from the evidence it would appear that it did not reach the ears of the Tenggalaïs who were well away in advance so long as they remained there. It was only by some of the Tenggalaïs coming back to where the Vadagalais were reciting that it was known they were reciting and in Tamil. If they had been reciting in Sanskrit, however loudly, the Tenggalaïs could have had no objection, because the right of the Vadagalais to form a separate group reciting in Sanskrit is admitted. So that the head and front of the Vadagalais' offending even in the eyes of the Tenggalaïs was really nothing more than their reciting in Tamil instead of in Sanskrit. This could not have been a "disturbance" of the worship of the Tenggalaïs within the meaning of section 296 of the Penal Code, unless it prevented the Tenggalaïs from performing their part of the worship which it never did. The conviction under this section, therefore, in my opinion also fails. I wish to offer no opinion as to whether religious processions in public streets in India are "lawful" or not, as from my point of view the decision of the question is unnecessary for

the disposal of this case. I would quash both the convictions and acquit the three accused. The fines inflicted on them, if levied, must be refunded.

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I should add that the whole proceedings in the Criminal Courts have been taken upon the erroneous view that the right of the Tengalais was a sole right to worship instead of a sole right to the emoluments attaching to the worship.

BENSON, J. :—With regard to the charge under section 153, Indian Penal Code, the two questions for decision are, firstly, whether the action of the accused Vadagalais in forming a separate group (*goshti*) behind the idol, and there singing the Tamil hymn (*Prabandham*) was in contravention of the injunction contained in the decree of the Civil Court, and, secondly, whether it was “wanton” or “malignant.” If their action was in contravention of the decree, it was “illegal” within the meaning of that word as defined in section 43, Indian Penal Code, and having regard to the previous disputes between the two sects, there can be little doubt that it was also “wanton” and “malignant” unless the accused *bona fide* believed that they were acting in accordance with the orders of the District Magistrate, who, as Magistrate, had the power to regulate the processions in such a way as to prevent a breach of the public peace. If their action was not “illegal,” no offence under section 153 could have been committed. If it was “illegal,” it must also appear that it was “wanton” or “malignant” in order to justify the conviction. On both points I am of opinion that the decision must be in favour of the accused. The decree established the exclusive right of the Tengalais as office-holders and to the enjoyment of the emoluments of the office, and it restrained the Vadagalais from interfering with the Tengalais by reciting the hymns as office-holders, though it expressly preserved the right of the Vadagalais to recite the hymns as “ordinary worshippers.” The exact order or ritual to be followed by “ordinary worshippers” is naturally not defined in the decree, but there is nothing in it to prevent a Vadagalai, or a group of Vadagalais from reciting the hymns as ordinary worshippers in any part of the procession, provided that they do not do it in such a way as to interfere with the office-holders discharging their duty as such. In the present case there was no such interference, and,

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therefore, no illegality in the action of the Vadagalais, and no offence under section 153. Even if the action of the Vadagalais was illegal, it would, I think, be difficult to say that it was "wanton" or "malignant", since it was in accordance with the orders of the District Magistrate in regard to the kindred processions to the big temple which had been going on for the previous four days—orders which the District Magistrate issued with a view to preventing their rival sects coming into collision and which were carried out under his own supervision and were successful in achieving the object aimed at. No special order was issued as regards the procession, out of which the present prosecution arose, but the circumstances were so similar to those connected with the big temple processions as to raise a strong presumption in favour of the *bona fides* of the accused, a presumption which is not rebutted by the evidence or by other circumstances connected with the procession.

As regards the offence under S. 296, Indian Penal Code, viz. "voluntarily causing disturbance to an assembly lawfully engaged in the performance of religious worship and ceremonies" I cannot accept the contention that the Tengalais were not "lawfully" engaged in religious worship because they were engaged in it on a highway. No doubt a highway is primarily intended for the use of individuals passing and re-passing along it in pursuit of their ordinary avocations, but in every country, and especially in India, highways have from time immemorial been used for the passing and re-passing of processions as well as of individuals and there is nothing illegal in a procession or assembly engaging in worship while passing along a highway, any more than in an individual doing so. No doubt, if a religious or any other procession interferes with the ordinary use of the highway by persons not members of the procession, the procession may be prohibited or controlled by the proper authorities, and I take it that no Court would convict a person under this section on an allegation that he voluntarily disturbed a religious procession if he could show that he was only using the road in the ordinary way and with due regard to the rights of others equally entitled to use it. But, subject to such control and the rights of others entitled to use the highway, there is, in my judgment, nothing illegal in a procession engaging in

worship on a highway. In a case referred to in a note to 1 Russell on Crimes p. 787, sixth Edition, it was held that "a peaceable procession in the street of a town, if lawful, and if the street is not obstructed more than is ordinarily the case under such circumstances, is not an indictable offence on the part of the members composing it."

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The same view was accepted as beyond dispute by *Turner, C. J.* and *Muthusawmi Aiyar, J.* in the case of *Parthasarathi v. Chinna-krishna*¹ where it was stated that persons of whatever sect "are entitled to conduct a religious procession through the public streets so that they do not interfere with the ordinary use of such streets by the public and subject to such directions as the Magistrate may lawfully give to prevent obstruction of the thoroughfare or breaches of the public peace." The passage was referred to with approval in the recent case of *Shadagopachari and others v. Ramu Row*—Appeal No. 211 of 1900—(not yet reported) in both of which the dispute was between the same rival sects as in the present case.

Again, in *Muthialu Chetti v. Bapun Saib*², *Turner C. J.* and *Muthusawmi Aiyar, J.*, said "It is a right recognized by law that persons may, for a lawful purpose, whether civil or religious, use a common highway by parading it attended by music so that they do not obstruct the use of it by other persons." Again in the Salem Full Bench case *Sundaram v. The Queen*³, *Turner, C. J.* reaffirmed in no uncertain terms the right to go in procession through the public streets subject to the control of the Magistrate, and referred to previous decisions of this Court in support of his view, and *Innes, J.*, said "I entirely concur with the Chief Justice in his exposition of the law relating to processions which is in accordance with the decisions of this and of the late Sadr Court for many years past."

Lord Esher, M. R., has well expressed the necessity for caution in restricting the use of highway by a too narrow reference to their primary purpose as a means of merely passing and re-passing. Referring to the judgment in *Reg. v. Pratt*⁴, he says: "I must observe

1. I. L. R., 5 M. 304.

3. I. L. R., 6 M. 203.

2. I. L. R., 2 M. 140 at 141.

4. 4 E. R. 860.

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that I think that if the language of *Erle, J.* and of *Crompton, J.* in *Reg. v. Pratt*¹, were construed too largely, the effect might be to interfere with the universal usage as regards highways in this country in a way which would be mischievous, and would derogate from the reasonable exercise of the rights of the public. Construed too strictly, it might imply that the public could do absolutely nothing but pass or re-pass on the highway, and that to do anything else whatever upon it would be a trespass. I do not think that this is so. Highways are, no doubt, dedicated *prima facie* for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser," *Harrison v. Duke of Rutland*².

This passage is referred to with approval by *Collins, L. J.* in *Hickman v. Maisey*³ and he adds: "Now primarily the purpose for which a highway is dedicated is that of passage as is shown by the case of *Dovaston v. Payne*⁴ and, although in modern times a reasonable extension has been given to the use of the highway as such, the authorities show that the primary purpose of the dedication must always be kept in view. The right of the public to pass and re-pass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilized, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage."

With these remarks I entirely agree. The practice of using the public highways for religious processions has existed in India for thousands of years. History, literature and tradition all tell us that religious processions to the village shrines formed a feature of the national life from the very earliest time. That alone is sufficient to raise a presumption that it is lawful and to throw on those who allege it to be unlawful the onus of showing that it is forbidden by law, but this it admittedly is not. The law recognizes the use of the highway by processions as lawful, and gives the

1. 4 E. & B. 860.
2. (1893) 1 Q. B. 142.

3. 1 (1900) Q. B. 752.
4. 2 H. Bl. 527.

Magistrate and superior officers of Police power to direct the conduct of assemblies and processions through the public streets and to regulate the use of music in connection with them, and to prevent obstructions on the occasion of such assemblies and processions (Madras Police Act XXIV of 1859, S. 49.) The law recognizes religious processions as lawful just as much as it recognizes other processions. If it were necessary to refer the origin of the use of highways for religious processions to a dedication of the highway to such use, I should find no difficulty in presuming such a dedication, for it is unreasonable to suppose that the dedicator would make a reservation against religious processions which would be wholly opposed to the sentiment of the community, and of which we can find no trace in the history or customary law of the country. It is more reasonable to suppose that he would dedicate the highway to the purposes for which, in accordance with the custom of the country, it would be required by the people. The penal law of India extends a special protection against voluntary disturbance to all assemblies lawfully engaged in religious worships. A procession is but an assembly in motion and if it is a religious procession it is, in my judgment, entitled to the special protection given by the Penal Code to assemblies lawfully engaged in religious worship.

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It may or may not be desirable to declare that religious processions on highway are unlawful, and that the processionists are trespassers, but this must be done, if at all, by the Legislature not by the Courts.

I think, then, that it cannot be said that the Tengelais were not lawfully engaged in religious worship within the meaning of section 296, but I am of opinion that the other element required to constitute the offence, *viz.*, "disturbance" has not been made out. No doubt the courts below have both held that there was "disturbance," but it is clear that this finding was based on the supposed illegality of the Vadagalais' action. That action, however, as we have seen, was not, in fact, illegal, and that being so, it was not, in my judgment, of such a character as to cause any disturbance within the meaning of the section.

For these reasons I concur with my learned brothers in holding that the conviction must be reversed, and the fines, if levied, refunded.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Rajaram Devai Appellant* (1st Defendant).

v.

Lakshmi Sankara Respondent (Plaintiff).

Rajaram
Devai
v.
Lakshmi
Sankara.*Trustee and cestui que trust—Wrongful withholding—Remission—Duty to invest—Trustee's right to insist on release—Costs.*

A trustee improperly retaining possession of trust property after demand by *cestui que trust* entitled to possession is a mere wrongdoer and will not be justified in granting remissions of rent to tenants.

Where trust property consists of money and cannot be applied immediately or at an early date for the purposes of the trust, the trustee is bound to invest the money for the benefit of the *cestui que trust*.

Where a trustee standing in *loco parentis* to the *cestui que trust* was defraying the latter's expenses and expected that certain comparatively small amounts in his hands would be required in a few months for such expenses and the sums were in fact so expended :—

Held that though the trustee might have invested with propriety the sums in the Savings Bank he was not guilty of a breach of trust in not so investing.

A trustee has no right to insist on the *cestui que trust* giving him a release as a condition precedent to his delivering trust property and will therefore be mulcted in costs even though he *bona fide* believed that he had such right.

Appeal from the decree of the Subordinate Judge's Court of Tanjore in O. S. No. 8 of 1899.

P. S. Sivaswami Aiyar for appellant.

K. Narayana Row and *G. Devasagayam* for respondent.

The Court delivered the following

JUDGMENT :—The appellant contends that the Subordinate Judge ought not to have charged him with the value of the remissions made by him in 1891, 1892, 1893 and 1898. As regards the 50 kalams remitted in 1898 we are not prepared to say that the Subordinate Judge's view is incorrect. The appellant was then a wrongdoer in that he was improperly retaining possession of the plaintiff's property after he had attained majority, and no sufficient reason is adduced to justify the grant of so large a remission, if it was, in fact, granted. As regards the three earlier remis-

sions they were much smaller in amount and they were granted long before relations between the parties were strained. They are proved by the appellant's sworn evidence to have been, in fact, made, and to have been made on good grounds, and he is supported by his contemporaneously written accounts, which we see no reason to discredit. The appellant must be allowed the value of these remissions, viz., Rs. 91-9-0.

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Sankara.

The appellant further contends that the Subordinate Judge was wrong in charging him with Rs. 29-9-6 and Rs. 14-7-0 on account of interest on sums which the appellant ought to have invested for plaintiff's benefit but did not.

The amount of these sums and the circumstances under which and the periods for which they were not invested are stated by the Subordinate Judge in paragraphs 26 and 27 of his judgment. There is no proof that the appellant made any profit out of these sums or used them for his own purposes. Had he done so he would be clearly liable to the plaintiff.

It is, no doubt, also true that where the trust property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound to invest the money for the benefit of the *cestui que trust*. If the trustee in the present case had invested the sums in his hands in the savings bank, he would, no doubt, have acted with propriety; but considering that the trustee was *in loco parentis* towards the plaintiff under the will of the testator and was defraying all the plaintiff's expenses, and considering that the trustee also foresaw that the sums in his hands would, within a few months, be required for the expenses of the plaintiff, as they, in fact, were, we do not think that he can be held to have committed a breach of trust in having failed to invest these comparatively small sums. We must therefore disallow these two items of interest to the plaintiff.

As regards the other items objected to by the appellant, we concur with the Subordinate Judge.

It was strongly contended before us that the Subordinate Judge should not have allowed the plaintiff proportionate costs. It was contended that the appellant acted within his rights in withholding from plaintiff after he attained majority the balance

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of cash admittedly in appellant's hands on his account, and also the landed and house property which belonged to plaintiff, because the plaintiff refused to give him a full discharge as regards his trusteeship; and it was also contended that even if appellant was not within his strict legal right in so doing, he *bonâ fide* believed himself to be so, and therefore ought not to have been *mulcted* in costs even to the extent decreed by the Subordinate Judge.

We are not referred to any authority to show, nor are we prepared to accede to the contention, that a trustee is justified in insisting on the *cestui que trust* giving him a release as a condition precedent to his delivering the trust property to him, and a *bonâ fide* belief on the appellant's part that such was his right is, in our opinion, immaterial as affecting the question of costs in a suit which was necessitated by his unlawful refusal. The obtaining a release is solely for the personal benefit of the trustee, and is not, in any sense, an act done in the execution of the trust. The cases cited before us by the appellant's pleader are, therefore, inapplicable to the present suit.

The proper course for the appellant was to have delivered over to the plaintiff the property to which the plaintiff was admittedly entitled; and, if nothing more was due to plaintiff, then to have required him to give an acknowledgment in writing to that effect, enforcing the right, if necessary, by legal proceedings.

The last contention of the appellant to which we need refer is as regards house rent. We have already stated that the appellant improperly retained possession of the plaintiff's house after he had attained majority. No doubt during the course of the suit the appellant presented a petition stating that he was ready to deliver the house to plaintiff, and the latter presented a petition stating that he was ready to take delivery, but beyond that the appellant took no steps whatever to deliver the house to the plaintiff.

We must, therefore, hold that the Subordinate Judge was right in decreeing rent to plaintiff up to the date of delivery of the house to him.

The decree of the Subordinate Judge will be modified to the extent indicated above and confirmed in other respects.

Each party will have proportionate costs in this appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Venkata Narasimha Appa

Row Bahadur Zemindar. Appellant* in S. A. 80 of 1901.

Vema Reddy Abbuta Row

Naikudu ... Appellant* in S. A. 81 of 1901.

v.

Sobhanadri Appa Row Baha-

dur Garu being minor

by manager Munshi Syed

Bandaji Sahib ... Respondent in both.

Landlord and Tenant—Zemindar—Lands given for private service—Discontinuance of service—Resumption of some lands—Notice for the remaining lands sufficient.

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Narasimha
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v.

Sobhanadri
Appa Row.

Where lands are given by a Zemindar to certain Nayaks as remuneration for certain private services to be rendered to him by them, it is competent to the Zemindar to give notice that the services are dispensed with and resume the lands.

Where after the services were discontinued, the Zemindar took possession of some of the lands and the Nayaks acquiesced in the same, it is sufficient if the Zemindar gives notice to the Nayaks of the remaining lands.

Second Appeals from the decrees of the District Court of Kistna in Appeal Suits Nos. 695 and 709 of 1899, presented against the decrees of the Court of the Subordinate Judge of Kistna at Masulipatam in O. S. Nos. 2 and 1 of 1891 respectively.

P. K. Nambiar and T. Rama Row for appellant.

C. Ramachandra Row Sahib for respondents.

The Court delivered the following

JUDGMENT :—The finding of the District Judge that the lands were given to the Nayaks as remuneration for services of a private nature to be rendered to the Zemindar has not been attacked on any legal ground, and we are bound by it. That being so, it was competent to the Zemindar to give notice and resume the lands. It is found that since 1882 the services have been discontinued, and that shortly after 1882 the Zemindar took possession of the 15 kattis of land which had been in possession of the peons. In 1886 the Zemindar gave formal notice to the Nayaks that he would at the end of the fasli resume possession of the 3 kattis of land which were in their possession. It is contended for the appellants that as there was no similar notice in regard to the 15 kattis, the resumption thereof was unlawful. But as the services had been discontinued and possession of the 15 kattis had

* S. A. Nos. 80 and 81 of 1901.

18th September 1902.

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v.
Sobhanadri
Appa Row.

been resumed by the Zemindar since 1882 to the knowledge of the Nayaks, we must hold that the Nayaks acquiesced in what was done, and that the Zemindar was not bound to give formal notice in respect of those lands.

Both the second appeals fail and are dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subramania Aiyar and Mr. Justice Davies.

Periakaruppan. ... Appellant* (*Defendant*).

v.

Palaniappa ... Respondent (*Plaintiff*).

Peria-
karuppan.
v.
Palaniappa.

Practice—Costs—Discretion—Interference by appellate Court.

Per *Subramania Aiyar, J.*—The discretion of the courts below in the matter of awarding costs cannot be interfered with by the High Court on second appeal.

Per *Davies, J.*—The uniform practice of courts in this Presidency is to award costs only on the amount decreed to plaintiff. *Velu Pillai v. Ghore Mahomed*, I. L. R., 17 M. 293 referred to. Where the award of costs by the courts below was against this practice it may be set aside.

Second Appeal from the decree of the District Court of Madura in A. S. No. 357 of 1900 presented against the decree of the Court of the District Munsif of Sivaganga in O. S. No. 526 of 1899.

P. R. Grant for appellant.

P. R. Sundara Aiyar for respondent.

The Court delivered the following

JUDGMENTS:—*SUBRAHMANIA AIYAR, J.*—I see no reason for reducing the amount awarded as damages. Nor, in my opinion, is there any reason for disturbing the order as to costs made in the courts below in the due exercise of the discretion vested in them by law. I would dismiss the second appeal with costs.

DAVIES, J.—I agree that there is no reason for reducing the damages awarded to the plaintiff. I am, however, unable to support the order of the courts below granting the plaintiff his costs on the whole amount of his claim instead of only on the amount decreed him inasmuch as it is opposed to the uniform practice of the courts in this Presidency, which is to grant costs only on the amount decreed. *Velu Pillai v. Ghose Mahomed*¹. Under S. 578 of the Code of Civil Procedure, the second appeal is dismissed with costs.

* S. A. No. 900 of 1901.

13th November 1902.

1. I. L. R., 17 M. 293.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Zemindar of Tarla. ... Appellant* (*Plaintiff*).

v.

Latchiah and another ... Respondents (*Defendants*).

Provincial Small Cause Courts Act (Act IX of 1887), Art. 13—Suit for cess—Small Cause nature—Second appeal—Rent—Rent Recovery Act, S. 4.

Zemindar of
Tarla
v.
Latchiah.

A suit for recovery of land-cess is not governed by Art. 13 of Act IX of 1887, and is therefore a suit of a small cause nature and no second appeal will lie from a decree passed therein if the value is less than Rs. 500. Land-cess can be included as rent under S. 4 of the Rent Recovery Act.

Second Appeal from the decree of the District Court of Ganjam at Berhampore in A. S. No. 188 of 1900, presented against the decrees of the Court of the District Munsif of Sompeta in O. S. No. 524 of 1899.

K. Ramachandra Aiyar for *P. R. Sundara Aiyar* for appellant.

K. Srinivasa Aiyangar for *V. Krishnasawmi Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—The land-cess can be included in the rent under S. 4 of the Rent Recovery Act. It can therefore be treated in the nature of rent. However this may be, it does not fall under Art. 13 of the 2nd Schedule of the Provincial Small Cause Courts Act.

The total amount of rent including the land-cess not being Rs. 500 in value, no second appeal lies. This second appeal is therefore rejected with costs. The memorandum of objections is rejected.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

The Aryan Bank of Vizagapatam (un-
limited) by the Ag. Managing Direc-
tor T. Appalanarasiah Patrudugaru ...

Appellant*
(Plaintiff
Decree-holder).

v.

Venkata Narasayamma ...

Respondent
(1st Defendant
Judgt.-debtor).

Aryan
Bank of
Vizagapatam
v.
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Narasayam-
ma.

Transfer of Property Act, S. 88—Civil Procedure Code, Ss. 230 and 244, Cl. (c)—Decree for sale—Direction by appellate Court to take accounts—Application by decree-holder to Original Court—Order declaring amount due—Appeal.

A decree for sale passed under S. 88 of the Transfer of Property Act is the final decree in the suit and all proceedings subsequent to that decree for the purpose of enforcing and working out such decree are proceedings in execution of that decree.

A decree for sale under S. 88 may either declare the amount due on the mortgage at the date of such decree or direct that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage on a future day which is to be fixed by the decree itself.

Where a decree for sale under S. 88 directs accounts to be taken, an application which the decree-holder may make, for taking the account and declaring the amount which may be found due on the taking of such account is an application to enforce the decree within the meaning of S. 230, C. P. C. Such an application may be made to the Court which passed the original decree, and an order passed thereon is appealable as being one falling under S. 244, Cl. (c) of the Civil Procedure Code.

Appeal from the order of the District Court of Vizagapatam, dated 30th August 1901, in O. S. No. 37 of 1896. (Pauper Appeal No. 5 of 1900 on the file of the High Court).

C. Krishnan and T. Rangachariar for appellant.

P. R. Sundara Aiyar for respondent.

The Court delivered the following

JUDGMENT:—This is an appeal by the decree-holder in O. S. No. 37 of 1896 (Pauper Appeal No. 5 of 1900 on the file of the High Court) against the order of the District Judge of Vizagapatam, dated 30th August 1901, declaring in Court under

* C. M. A. No. 164 of 1901.

15th April 1902.

S. 88 of the Transfer of Property Act the amount due to the decree-holder for principal and interest on the mortgage up to 7th August 1901, on taking an account as directed by the decree of this Court, dated 7th February 1901, in the above appeal. The respondent's pleader raises the preliminary objection that no appeal lies to this Court against the said order, and he admits that, if this objection were well-founded, the account itself should have been taken in this Court and the order fixing the amount should have been declared in Court by this Court on the 30th of August 1901. In our opinion the objection is not well-founded and the order appealed against is really one falling under S. 244 (c) of the Civil Procedure Code, being a question arising between the parties to the suit in which the decree was passed on appeal by this Court and relating to the execution of that decree. Following the decision of this Court in the recent Full Bench cases¹, we hold that a decree for sale passed under S. 88 of the Transfer of Property Act is the final decree in the suit, and that all proceedings taken subsequent to that decree for the purpose of enforcing and working out such decree are proceedings in execution of that decree. A decree for sale passed under that section may declare the amount due on the mortgage at the date of such decree, or direct, as was done in this case, that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage on a future day which is to be fixed by the decree itself. In this case the 7th of August 1901 was the day so fixed by the appellate decree of this Court, dated 7th February 1901, and the decree further provided that the amount that may be declared due on the 30th of August 1901 should be paid on or before the 31st of December 1901. In our opinion an application which the decree-holder may make for taking the account and declaring the amount which may be found due on the taking of such account is an application to enforce that portion of the decree within the meaning of S. 230 of the Code of Civil Procedure, and that being so, the decree-holder is entitled to apply under S. 583 to the Court which passed the decree against which the appeal was preferred to the High Court. The Court which is to declare the amount due by virtue of the appellate decree is, therefore, the Court which passed the original decree. In this view the order in question falls under S. 244 (c) and is

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1. See *Mallikarjunadu Shetti v. Lingamurti Pantulu, &c.*, I. L. R., 25 M. 244.

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ma.

analogous to orders under clauses *a* and *b* of S. 244 fixing the amount of mesne profits or interest payable under a decree.

The preliminary objection therefore fails. The appellant's counsel takes exception to two items in the account. The first relates to the amount of mesne profits, Rs. 12,666-10-8. In regard to this no evidence has been offered by the appellant to show that it should not be fixed on the basis of the lease, as was done by the Judge.

As regards the second item, Rs. 6,161-11-0, no doubt in the plaint it was credited towards the mortgage-debt sued for, but it was so credited towards the amount due under three mortgage bonds, whereas in appeal the appellant was made liable only under two mortgage bonds. In the absence of any evidence to the contrary, the District Judge ought to have credited only a proportionate share of this item towards the sum due by the appellant. The Vakils on both sides agree that on this account the figure Rs. 6,161-11-0 should be Rs. 4,407.

We allow the appeal to this extent and modify the sum declared in para 1 of the District Judge's order by substituting Rs. 22,619-6-10 for Rs. 20,864-11-10.

Appellant and respondent will pay and receive proportionate costs calculated on the above two items in this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Boddam.

Thomas Souza Appellant* (*Counter-Petitioner, Plaintiff*
Decree-holder).

v.

Gulam Moidin Beari, purchaser from and
representative of the Judgment-debtor
and another Respondents (*Petitioner*
and Judgment-debtor).

Thomas
Souza
v.
Gulam
Moidin Beari.

Specific Relief Act, S. 9—Civil Procedure Code, S. 647—Decree for possession—Order in Execution—Appeal—Applications for execution—Proceeding in suit—Standing crops—Purchaser from trespasser—Right to stay delivery.

An order passed in execution of a decree passed under S. 9 of the Specific Relief Act is not appealable.

* A. A. A. O. No. 2 of 1902.

11th September 1902.

Applications for execution of decrees are proceedings in suits. *Thakur Pershad v. Sheikh Fakir Ullah*, L. R., 22 I. A., 44 (50) and S. 647, C. P. C., referred to.

Thomas
Souza
v.
Gulam
Moidin Beari.

A decree-holder entitled to possession of land is entitled to the land and the standing crops thereon, and a purchaser of the crops from a trespasser is not entitled in law or equity to an order deferring the handing over of the land to the decree-holder until the growing crops have been gathered.

Appeal from the order of the District Court of South Canara, dated 26th November 1901, in A. A. O. No. 243 of 1901, presented against the order of the Court of the District Munsif of Mangalore, dated 16th August 1901, in M. P. No. 840 of 1901. (*O. S. No. 218 of 1900*).

The appellant brought O. S. No. 248 of 1900 in the District Munsif's Court of Mangalore for recovery of possession of plaint properties under S. 9 of the Specific Relief Act. He obtained a decree. When in execution of the decree the plaintiff applied for possession, the respondent who purchased from the judgment-debtor the sugarcane plantation standing on the land claimed a right to it. The District Munsif held that the standing crops must go with the land and ordered execution to issue. The respondent appealed. An objection that no appeal lay was overruled by the District Judge, who held that as purchaser from and therefore representative of the judgment-debtor, the respondent had a right of appeal under S. 244. On the merits he held that execution may issue, but that the respondent must have free access to the land for the enjoyment of the plantation. Against this order this appeal was preferred.

P. R. Sundara Aiyar for appellant.—No appeal lay to the lower court. S. 9 of the Specific Relief Act deprives him of the right of appeal which he may ordinarily have. The word *decree* will also include orders in execution. See I. L. R., 12 M. 116. The decree for possession of the property carries with it all crops which may stand upon it. See I. L. R., 13 M. 215, *Ib.* 2 B. 617, 13 W. R. 104.

K. Narayana Row for respondent.—The section does not affect appeals from orders in execution. Orders in execution are not orders in suit till S. 647, C. P. C., was amended (*P. R. S. In 22 I. A. 44*, the Privy Council held that the amendment only declared the law). That does not touch this. S. 9 of the Specific Relief Act should be construed in the light of the law as understood at the time of the Act. No decision was quoted directly deciding this

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point. In cases which arose under a provision of the Registration Act very similar to this, appeals have been held to lie against orders in execution, See I. L. R., 5 B. 673 and I. L. R., 1 A. 583. 12 M. case quoted is rather in my favour, as it allows one appeal though not a second. S. 244 will apply to this case as my client was a purchaser of the property which was the subject of the suit and is therefore a representative of the debtor I also contend that the appellant is estopped because he drew the money deposited by me in court for his costs.

The Court delivered the following

JUDGMENT:—We are of opinion that the decree of the District Judge is wrong and must be reversed. The suit was brought under S. 9 of the Specific Relief Act (Act I of 1877). By the last clause of that section "no appeal shall lie from any order or decree passed in any suit under this section," etc. According to the explanation to S. 647 of the Civil Procedure Code, applications for execution of decrees are proceedings in suits. This, the Privy Council says in *Thakur Pershad v. Sheik Fakir-ullah*¹, is a mere statement of what was the law. The application upon which this decree was passed was an appeal against a decree or order in execution of the decree under S. 9 of the Specific Relief Act and therefore there was no appeal.

Again on the merits it appears to us that the decision is wrong. The plaintiff obtained a decree for possession and was entitled to possession as from the date of the decree at least. At that time the crops were standing and the plaintiff was entitled to possession of the land and what was on it. The land was cultivated by a trespasser who after the decree sold the growing crops to the present applicant. We are unable to discover any right either in law or in equity which can entitle the applicant to an order deferring the handing over of the land to the plaintiff until the growing crops have been gathered by the applicant.

The decree of the District Judge is reversed and that of the District Munsif is restored with costs in this and in the lower Appellate Court.

1. L. R., 22 I. A. 44 at 50.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Achutan Nambudri ...	...	Appellant*
		(Plaintiff).
v.		
Koman Nair and others ...	...	Respondents
		(Defendants).

Kanom—Agreement to renew—Subsequent purchaser with notice—Rights of purchaser to eject—Specific performance.

Achutan
Nambudri
v.
Koman Nair.

Where there is only an agreement to renew a kanom (or mortgage) for 12 years and the owner sells the property to a third person who purchases with notice of the prior agreement, such third person can sue to eject the person who is in possession and who is entitled to get the kanom renewed under the agreement notwithstanding the fact that the person in possession would be in time at the institution of the suit for suing for specific performance of the prior agreement.

Ramasami Pattar v. Chinnan Asari, I. L. R., 24 M. 462; and *Maddison v. Alderson*, 8 A. C. 474, followed.

Quære :—Whether an agreement to renew a kanom is not an agreement to lease, and if so a lease within S. 3 of the Registration Act and requires to be registered under S. 17.

Second appeal from the decree of the District Court of South Malabar in A. S. No. 859 of 1899, presented against the decree of the Court of the District Munsif of Angadipuram in O. S. No. 475 of 1898.

Plaintiff is the appellant. The suit was to recover, with future michavaram, two items of land demised on kanom by 6th defendant, the owner of the lands, to the 1st defendant. The plaintiff had obtained a melcharth with authority to redeem the lands from the 6th defendant. The kanoms to the 1st defendant were dated 22nd June 1880 for 200 fanams. The 6th defendant had also received from the 1st defendant a purankadom of 1,000 fanams. Defendants 2 to 4 deriving title to the lands from 1st defendant by way of gift pleaded that on the 6th August 1896, the 6th defendant had agreed to grant a renewal of the kanom to 1st defendant and that therefore the plaintiff could not redeem. The

* S. A. No. 29 of 1901.

15th September 1902.

Achutan
Nambudri
v.
Koman Nair.

District Munsif found the agreement of renewal a forgery, but the District Court found it genuine and held that the plaintiff was not entitled to recover. The plaintiff preferred this second appeal to the High Court.

P. R. Sundara Aiyar for appellant :—The kanom to the 1st defendant is a lease (S. A. 1962 of 1897), and therefore without registration it is void. Even if it be a mortgage, the mortgage amount with the purankadom exceeding Rs. 100, the kanom should have been registered. 1st defendant or defendants 2 to 4 deriving title from him not having sued for specific performance of the agreement to renew the lease within three years from the date of execution are not now entitled to claim it. Their claim is now barred. Their allegation in the written statement that they are entitled to specific performance cannot be treated as a cross plaint. It is enough if they have not sued for specific performance within three years and their claim is barred on the date of decree. No principle of equity is applicable here as the policy of the Transfer of Property Act is to obtain a general registry of certain dealings of immovable property. 24 M. 462, 8 A. C. 474.

The policy of the Registration Act is to secure a general registry of certain dealings with immoveable property, and therefore the kanom not having been registered cannot be recognised. The defendants not having sued for specific performance within three years of the agreement, they cannot now claim to be entitled to it.

J. L. Rosario for respondent :—The kanom having been originally for 200 fanams only did not require registration. The fact that there was a purankadom of 1,000 fanams does not affect the matter. That might have been repaid before the mortgage money is repaid (*Bhashyam Aiyangar, J.* That will be only a payment of a portion of the mortgage money).

The Court delivered the following

JUDGMENT :—Before deciding this second appeal we desire to have a finding as to whether the plaintiff when he obtained the melkanom had notice of the prior agreement to renew by 6th defendant in favour of 2nd defendant evidenced by Exhibit I. The District Judge is requested to return a finding on this issue within four months. Further evidence may be taken.

Seven days will be allowed for filing objections after the finding has been posted up in this Court.

Achutan
Nambudri
v.
Koman Nair.

In compliance with the above judgment, the District Judge submitted the following

Finding :—I am directed to record a finding on the point whether the plaintiff, when he obtained the melkanom, had notice of the prior agreement to renew by 6th defendant in favour of 2nd defendant evidenced by Exhibit I. The facts of the case are already recited in the judgments of the District Munsif and of my predecessor. The plaintiff sues on a melkanom deed, Exhibit A, dated 24th January 1898, to recover two items of land formerly in the possession of the 1st and 2nd defendants, who are husband and wife. It has been proved that prior to this date, the 6th defendant, who is the jenmi of the property and the grantor of Exhibit A, had accepted renewal fees from the 2nd defendant and had promised to give her an extension of kanom for 12 years under Exhibit I.

[The Judge after discussing the evidence as to notice continued] :—I think the probabilities are decidedly in favour of the plaintiff having known of the existence of the receipt Exhibit I. On all these grounds I find that the plaintiff had notice of the prior agreement referred to.

This second appeal coming on for final hearing after the return of the finding, the Court delivered the following

JUDGMENT :—The finding that the plaintiff had notice of the agreement to renew, evidenced by Exhibit I, is not seriously impugned. We accept the finding.

But it is argued on behalf of the appellant that the kanom held by the 2nd defendant is really a lease, and that Exhibit I, as an agreement to renew a lease, is a lease, according to the definitions of that term in S. 3 of the Indian Registration Act, and that its registration is therefore compulsory under S. 17 (d) of the Act, and also that though Exhibit I contemplates the execution of a further document, yet clause (h) of S. 17 of the Registration Act does not exempt Exhibit I from registration, inasmuch as the

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exemption under clause (h) is limited only to the instruments specified in clauses (t) and (c) of S. 17. It is further contended that if the kanom held by the 2nd defendant is to be regarded in law as a mortgage, not as a lease, the agreement to give a renewed kanom will be for the original kanom amount of 200 fanams and for the purankadom of 1,000 fanams, the aggregate of which sums is more than Rs. 100, and that under the Transfer of Property Act, S. 59, the kanom which was intended to be created can be effected only by an instrument in writing registered and that therefore the 2nd defendant at the date of the suit had acquired no interest in the property which would bar the plaintiff's right to redeem the then subsisting mortgage, the term of which had expired. It is not necessary in this case to decide whether the kanom is to be regarded as a lease, and not merely a mortgage, as, in our opinion, the plaintiff must succeed on the 2nd ground. The 2nd defendant's pleader argues that at the date of the suit the 2nd defendant was in a position to enforce specific performance of the contract to renew evidenced by Exhibit I, though she may now be barred by limitation from doing so.

The fact, if it be so, that the 2nd defendant was then in such a position, does not, in our opinion, satisfy the requirements of the Transfer of Property Act, the policy of which is to secure a public registry of mortgages affecting immoveable property exceeding Rs. 100 in amount.

In the absence therefore of a registered instrument in support of the 2nd defendant's alleged title to hold the kanom for a further period of 12 years, we must hold that the 2nd defendant has no valid answer to the plaintiff's claim to redeem. *Ramasami Pattar v. Chinnan Asari*,¹ and *Maddison v. Alderson*.²

We allow the appeal, set aside the decree of the Lower Appellate Court, and restore the decree of the District Munsif with the modification that the compensation payable to the defendants 2 to 4 shall be that fixed by the Lower Appellate Court; and the time for redemption is extended until this day six months.

The 2nd to 4th respondents must pay the plaintiff's costs in this and in the Lower Appellate Court.

1. 1. L. R. 24 M. 462.

2. 8 A. C. 474, per Lord Selborne.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Mohamedsha Khan Sahib and others... Appellants* (*Plaintiffs*).

v.

Srinivasulu *alias* Srinivasa Rao and

others Respondents. (*Defendants*
3, 1 & 2 and *legal reptves.*
of 4th defendant).

Several attachments—Sale in pursuance of one—Sale set aside under S. 310-A—Mohamedsha
Revival of other attachments—Waiver. Khan Sahib

Where a sale held in execution of a decree is set aside under S. 310-A by payment to the decree-holder who brought the property to sale, the attachment made at the instance of other decree-holders is not thereby cancelled. Srinivasulu.

Where, by way of caution, a decree-holder who has previously attached the property of his Judgment-debtor asks for re-attachment, he does not thereby abandon or waive the original attachment especially when he refers to the prior attachment as subsisting and asks for re-attachment only if the court should deem it necessary.

Second appeal against the decree of the Subordinate Judge's Court of Kistna at Masulipatam in A. S. No. 157 of 1900, presented against the decree of the Court of the District Munsif of Masulipatam in O. S. No. 760 of 1898.

P. S. Sivaswami Aiyar for appellant.

T. V. Seshagiri Aiyar for 1st respondent.

The Court delivered the following

JUDGMENT:—The sale never having been confirmed, but having been set aside under section 310-A, G. P. C., was not a completed sale, and that sale therefore cannot have the effect of removing the attachment which had previously been made at the instance of another decree-holder, the present respondent, who would have been entitled to rateable distribution under section 295 of the C. P. C. only if the sale had not been set aside. The appellant also contends that the attachment was abandoned by the respondent, because he again caused an attachment to be made after the sale was set aside under section 310-A. This was only a precautionary step and cannot amount to an abandonment of the prior attachment, and we may add that the petitioner expressly stated in the petition that the former attachment was in law subsisting, but that if the court thought it necessary a re-attachment might issue. The decree of the Subordinate Judge is therefore right, and this second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subramania Aiyar and Mr. Justice Davies.

Mathureswara Bhattar and another ... Appellants*
(Defendants 1 and 2).

vs.

Karpura Kutti Bhattar and another ... Respondents
(Plaintiffs).

Mathures- Joint owners—Refusal of some to sign patta—Rent due by tenant irrecoverable—Right
 wara Bhattar of others to sue for damages.
v.

Karpura Where in consequence of the refusal of some of the co-owners of a land to sign a
 KuttiBhattar. patta for acceptance by the tenant, rent due by the tenant became irrecoverable, the
 co-owners who so refused to sign would be liable to the others for the loss sustained
 by them as regards their share of the rent.

The fact that a remedy for partition was open to the other owners would not
 take away the right of the latter to sue for damages.

Appeal from the decree of the District Court of Madura in
 A. S. No. 520 of 1901, presented against the decree of the District
 Munsif of Madura in O. S. No. 541 of 1900.

P. S. Sivaswami Aiyar for appellants.

P. R. Sundara Aiyar for respondents.

The Court delivered the following

JUDGMENT:—As the District Judge has pointed out the
 defendants were under a legal obligation to join the plaintiffs in
 the puttahs tendered to the tenants. Section 3 of the Rent
 Recovery Act requires the Inamdar to grant a puttah to the tenant,
 and under the rulings of this court when there are joint Inamdars
 all of them must join in granting the puttah. Under section 7 of
 the same Act rent cannot be recovered unless such puttah has been
 granted. Owing to the defendants' refusal to join the plaintiff the
 rents for the faslis named in the plaint have become irrecoverable,
 and the plaintiffs' share has been lost to them. In circumstances
 such as the present, we think that there was not only a legal
 obligation on the defendants with reference to the tenant, but also
 between them and the plaintiffs *inter se*. To hold otherwise would
 be to allow a co-owner with impunity so to conduct himself in
 regard to the common property as would result in its being damag-
 ed or destroyed. If there is one obligation between co-owners

* A. A. O. No. 62 of 1902.

27th October 1902.

stronger than another, it is that each shall do what is just, reasonable and necessary for the preservation of the joint property. Dealing with the obligations springing from the relations between co-owners, Domat lays it down generally that those who have an affair or other thing in common together are mutually accountable to one another for their management and their conduct in relation to it, and every one of them must answer for the damage or loss which they may have occasioned to the common thing (Civil Law, Article 1492). In this case the refusal of the defendants to sign the puttah entailed loss to the plaintiffs, and if that refusal was not justifiable, the defendants are clearly liable to the plaintiffs in damages. Assuming that the plaintiffs could obtain partition of the joint estate, that fact does not debar them from their remedy for damage to that estate while it remains joint.

Mathures-
wara Bhattar
v
Karpura
Kutti Bhattar.

The order of remand was therefore right, and the appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Chief Justice* and
Mr. Justice Benson.

Arunachela Reddi and another ... Appellants*
(Defendants 3 & 4).

v.

Chidambara Reddi ... Respondent
(Plaintiff).

Guardian and ward—Testamentary guardian—Alienation by de facto guardian—Necessity—Acquiescence.

Arunachela
Reddi

v.

Chidambara
Reddi.

An alienation of a minor's estate made by the *natural* and *de facto* guardian will be valid if for necessity notwithstanding that there was a testamentary guardian in existence (especially where such testamentary guardian had acquiesced in the alienation).

Second Appeal from the decree of the District Court of Trichinopoly in A. S. No. 117 of 1899, presented against the decree of the Court of the District Munsif of Kulitalai in O. S. No. 403 of 1898.

P. S. Sivaswami Aiyar for appellants.

T. Natesa Aiyar for respondent.

Arunachala
Reddi

v.
Chidambara
Reddi.

The Court delivered the following

JUDGMENT:—The Lower Appellate Court decided against the validity of the alienations to defendants 3 and 4 on the ground,

(1) that they were made by the 1st defendant who was the *de facto* guardian of the minor, her adopted son, at a time when there was a testamentary guardian who had been appointed under the will of the widow's husband.

(2) that the alienees had failed to show that the alienations were necessary in the interest of the minor.

As regards the 1st ground it is well settled that an alienation may be validly made by a *de facto* guardian (assuming, of course, the necessity). In the present case, the 1st defendant, as the minor's mother, was his natural guardian. The evidence shows that the testamentary guardian, the plaintiff's father, (2nd defendant), acquiesced in the alienations made by the 1st defendant and that he assisted her in the management of the estate. In our judgment the fact that at the time the alienations were made by the 1st defendant, the 2nd defendant had been appointed testamentary guardian is no ground for holding that it was competent for the 1st defendant to make the alienations.

As regards the question of necessity, the documentary evidence shows that the alienations were made in part for the purpose of discharging a liability incurred by the husband of the 1st defendant and in part in connection with litigation in which the question of the validity of the minor's adoption was involved.

No doubt the alienees were near relatives of the 1st defendant but there is nothing to suggest that in making the alienations to them she was acting otherwise than in the interest of the minor's estate.

We think the evidence shows the necessity for the alienations, and we accordingly allow the appeal of the 3rd and 4th defendants, and restore the Munsif's decree.

The plaintiff must pay the costs of these defendants, here and in the Lower Appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

[illegible]

v.

Rangappa Naicken Respondent
(Defendant).

Revenue Recovery Act (11 of 1 64), 8. 59—Revenue sale—Sale not confirmed—Owner when aggrieved—Suit for setting aside sale—Limitation.

Sabapathy
Chetti
v.
Rangappa
Naicken.

The title of a purchaser in a revenue sale becomes complete only on confirmation by the Collector and the purchaser becomes entitled to possession and to have the lands registered in his name only after such confirmation. The owner whose property is sold for arrears of revenue cannot be said to be a person "aggrieved" within the meaning of S. 59 of Act II of 1864 until such confirmation by the Collector and may therefore bring a suit for setting aside the sale within six months from such date. Decision in *Venkata v. Chengadu*, I. L. R., 12 M. 168 is no longer applicable.

Second Appeal from the decree of the District Court of
of Madura in A. S. No. 309 of 1900, presented against the decree
of the Court of the District Munsif of Tirumangalam in O. S.
No. 31 of 1900.

K. Srinivasa Aiyangar for appellants.

R. Kuppusami Aiyar for respondent.

The Court delivered the following

JUDGMENT :—We do not think that the District Judge was right in holding that the day on which the property was put up for sale and knocked down was the date on which the plaintiff's cause of action arose. The provisions of S. 38 of the Act II (of 1864), which were first enacted as an amendment by Act III of 1884, show that until confirmation by the Collector the sale proceedings are incomplete, and are liable to be set aside or confirmed by the Collector either on the application of the parties, or of his own motion. It is the confirmation of the sale which gives to the purchaser the right to possession, and to have the lands registered in his name. Until the sale proceedings have been

* S. A. No. 891 of 1901.

7th November 1902.

Sabapathy
Chetti
v.
Rangappa
Naiken.

confirmed, it cannot properly be said that the rights of persons whose interests will be affected by the sale are injured so as to give them a right of suit as persons aggrieved within the meaning of S. 59 of the Act. To hold otherwise would lead to the unreasonable result that a party would be obliged to take futile proceedings before the expiry of six months from the sale in order to protect himself against the possible action of the revenue authorities in connection with the sale at some subsequent time. For example, in the present case, the sale was set aside by the Deputy Collector, (who was entitled to confirm or set it aside under the law) on the 16th December 1898, i. e., before the expiry of six months from the date of the sale (19th August 1898). It was not until long after the expiry of the six months that the Collector reversed the Deputy Collector's order and confirmed the sale. If the view adopted by the District Judge, and urged for the respondent, were correct, the present plaintiff should have brought a suit as an aggrieved party within six months of the sale, though he had obtained satisfaction and got the sale set aside by applying to the Deputy Collector, and had no further grievance. It is scarcely necessary to say that the Legislature could not have intended the taking of such futile proceedings, and the only reasonable view is that, in cases like the present, there is no grievance giving a right to sue until there is an order confirming the sale.

The decision in *Venkata v. Chengodia*¹ was in regard to a sale that took place before the provisions of the present S. 38 were enacted and when the law made no provision for the confirmation of sales by the Collector and when therefore the sale was complete as soon as it was held. That decision has no bearing on the present case. We set aside the decree of the District Judge and remand the appeal for decision on the merits. Costs in this Court will abide the result.

1. I. L. R., 12 M. 168.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Sinnu Sastryal *alias* Ramasawiny

Sastryal Appellant* (4th Defendant)
Petitioner.
v.

Subramania Sastryal and another ... Respondent (*Plaintiff Counter-Petitioners.*)

Venkatrama Sastryal and another ... Appellants* (*Petitioners, Defendants 2 and 4.*)
v.

Subramania Sastryal and 2 others ... Respondents (*Counter-Petitioners, Plaintiffs and Purchasers.*)

Decree—Execution—Res Judicata—Order to sell property free of mortgage—Mortgagee's consent—Decree-holder proceeding to sell subject to mortgage—Notice to mortgagee and judgment-debtor

Sinnu
Sastryal
v.
Subramania
Sastryal.

Where an order was obtained with the consent of the mortgagee for the sale of property free of the mortgage in execution of a money-decree, the decree-holder cannot without notice to the mortgagee or the Judgment-debtor get the order revoked and proceed to sell the property subject to the mortgage.

Appeals from the orders of the Subordinate Judge's Court of Kumbakonam, dated 25th January 1902 and 18th April 1902 in C. M. P. Nos. 76 & 261 of 1902 respectively in O. S. No. 11 of 1899.

V. Krishnasami Aiyar, V. C. Seshachariar and C. V. Krishnasamy Aiyar for appellant.

P. S. Sivaswami Aiyar and K. Ramachandra Aiyar for respondents.

The Court delivered the following

JUDGMENT:—We think that the order of the Subordinate Judge to sell the property subject to Krishnaier's mortgage was wrong. The Subordinate Judge had previously, with Krishnaier's consent, ordered that the property should be sold free of his mortgage, and that order ought not, on the application of the decree-holder, to have been virtually revoked, and that without notice to, or the consent of, Krishnaier or his representatives or the Judgment-debtor. The Judgment-debtor justly complains that if the property was to be sold free of incumbrance (as originally ordered) it could be sold in conveniently small lots, for which there would be a larger circle of bidders, and that a higher price would thus have been realized.

* A. A. O. Nos. 23 & 72 of 1902.

10th November 1902.

Sinnu
Sastryal
v.
Subramania
Sastryal.

We may add that on the 29th January 1902, while the sale, which began on the 23rd, was still in progress, the Judgment-debtor obtained an order from the High Court for an *interim* stay of the sale, and his local Vakil at Kumbakonam informed the Subordinate Judge of the fact, that the order would reach him next day, and asked for an adjournment or rather continuance of the sale until the next day, 30th, but the Subordinate Judge under the erroneous impression that the seven days from the 23rd (during which the sale could be continued without a fresh proclamation) expired on the 29th, refused to grant the application. It is clear that but for this mis-apprehension the Subordinate Judge would have continued the sale on the 30th, and then stayed it, as he was bound to do, on receipt of the High Court order. On these grounds we must set aside both the orders of the Subordinate Judge appealed against, and the order confirming the sale, and direct the Subordinate Judge to re-sell the property, after issuing a fresh proclamation in due form.

Appellants must have their costs in both courts.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Subbammal...	...	...	...	Appellant* (Defendant).
v.				
Muthu Pathan	...	...	...	Respondent (Plaintiff).

Subbammal v. Muthu Pathan. *Benamidar—Mortgage with consent of real owner—Payment by benamidar—Charge.*

Where a benamidar executes with the consent of the real owner a mortgage for a consideration binding upon the real owner, a payment made by the benamidar of the mortgage amount is not an officious and voluntary payment and the benamidar is entitled to a charge upon the property.

*Bhugwati Prasad v. Radha Kishen*¹ applied and followed.

Second Appeal from the decree of the District Court of Trichinopoly in A. S. No. 186 of 1899, presented against the decree of the Court of the District Munsif of Trichinopoly in O. S. No. 4 of 1897.

P. R. Sundara Aiyar for appellant.

T. Natesa Aiyar for respondent.

* S. A. No. 788 of 1901.

11th November 1902.

1. I. L. R., 15 A. 304.

The Court delivered the following

Subbammal

v.
Muthu
Pathan.

JUDGMENT :—The plaint is not drawn up with sufficient clearness to disclose exactly the cause of action on which the suit is based nor does it appear clearly that the property over which the plaintiff claims a charge was purchased subject to a pre-existing mortgage which the plaintiff undertook to discharge. In O. S. No. 22 of 1893, the plaintiff relying upon his title as purchaser sued to eject the defendant, but it was held by the Court of Appeal that the defendant was the real purchaser and that the sale-deed was taken only nominally in plaintiff's name. The finding therein being conclusive in the present suit, the plaintiff now sues to recover the sum of Rs. 311-5-6 as a charge upon the said property on the ground that he paid the principal of that sum, partly on the 21st May 1892 and partly on the 15th March 1893, to one Krishna Pathan in discharge of a mortgage on the said property made to him by the plaintiff himself on the 16th April 1888; and as appears from para. 3 of the District Munsif's revised judgment, the plaintiff's case seems to be that Krishna Pathan's mortgage is connected with the discharge of the original mortgage subject to which the property in question was bought for the defendant in the name of the plaintiff. This however is not clearly stated in the plaint nor established by evidence. The defendant, however, in her deposition admits that the mortgage in favour of Krishna Pathan was made for her benefit and with her consent, and her plea was that the said mortgage was discharged by the plaintiff with her own money and that therefore he is not entitled to recover it from her. Both the Courts below concur in finding that her plea is false and that the plaintiff discharged Krishna Pathan's mortgage with his own money, and they passed a decree in his favour for recovery of the same as a charge upon the property, the claim to recover it as a debt being dismissed as barred by the law of limitation.

The only question for determination, therefore, in this appeal is whether the plaintiff has acquired a charge upon the property by his having discharged the mortgage-debt to Krishna Pathan. That mortgage having been made by the plaintiff with the consent of the defendant and for her benefit, it was a valid incumbrance on the property as against the defendant, and the plaintiff having

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Pathan. made himself liable, at the defendant's request for the debt contracted from Krishna Pathan, he cannot be regarded as having paid Krishna Pathan's debt officiously or as a mere volunteer. As between himself and the defendant, the latter was bound to discharge the same and she not having done so, the plaintiff discharged the obligation he was under to Krishna Pathan and by such payment relieved the property, for the benefit of the defendant, from Krishna Pathan's incumbrance. Under these circumstances, the decision of the Privy Council in *Bhagwati Prasad v. Radhakishen*¹ is a clear authority that the plaintiff is entitled in equity to have it declared that the amount claimed by him is a charge upon the property.

In that case, in execution of a money-decree, the judgment-debtor's property was attached and brought to sale and the same was by desire of the judgment-debtor (Bir Bhaddar) and for his benefit, purchased, by Nandan Tewari (his agent) who, by hypothecating the property to one Sargu Prasad raised a loan and paid the same into Court to complete the purchase. Sargu Prasad brought a suit on the mortgage bond against Nandan Tewari, the ostensible purchaser and in execution of the decree which he obtained on the mortgage, became the purchaser of the mortgaged property. In a suit subsequently brought against Sargu Prasad, by Bir Bhaddar, it was however held by the Indian Courts that Sargu Prasad was aware that Nandan Tewari was only a benami purchaser and that therefore the mortgage which he obtained from him, the decree thereon and the sale in execution thereof were invalid as against Bir Bhaddar. Sargu Prasad thereupon brought a suit against Bir Bhaddar and Nandan Tewari for the recovery of the amount lent by him to Nandan Tewari on the mortgage executed by the latter and claimed to enforce payment of the same also as an equitable charge upon the property in the hands of Bir Bhaddar even if the mortgage as such was not binding upon him. On appeal by Sargu Prasad, the Judicial Committee of the Privy Council in giving a decree in his favour stated as follows (at page 309) :—"After the judgment in the former suit it might be difficult to hold that the deed executed by Nandan Tewari was a valid hypothecation of the property, and it is not necessary to decide that question. The facts admitted by Bir Bhaddar and also found

1. I. L. R., 15 A. 304.

by the Court in the former suit between these parties are sufficient to show that the appellant (the representative of Sargu Prasad) is entitled in equity to have it declared that the sums claimed with interest are a charge upon the property."

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It will be observed that the Privy Council considered it unnecessary to decide whether the mortgage as such was or was not binding upon Bir Bhaddar inasmuch as it had been decided by the High Court in a previous litigation between the same parties that the mortgage and the sale in enforcement thereof were invalid as against Bir Bhaddar. Their Lordships, however, came to the conclusion that quite independently of the charge created by the mortgage, Sargu Prasad was entitled in equity to a charge against the property in the hands of Bir Bhaddar for whom his agent Nandan Tewari purchased the property by means of the loan advanced to him for that very purpose by Sargu Prasad. The plaintiff's claim in the present case to an equitable charge is even stronger inasmuch as the incumbrance which was discharged by the plaintiff under an obligation which he entered into at the request of the defendant was according to her own admission binding upon her.

The second appeal therefore fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Marimuthu Udaiyan and others ... Appellants* (*Defendants 3 to 7*).

v.

Subbaraya Pillai and others ... Respondents (*Plaintiffs 2 to 7 & 1st Defendants*).

Civil Procedure Code Ss. 294, 295, 312, 314 and 622—Purchase by Decree-holder—No permission of Court—Application to set aside—Confirmation—Person interested in sale—Limitation Act, Act 166—Judgment-debtor's sons—Void or Voidable—Restitution—Sale to a bona-fide purchaser..

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The sons of a judgment-debtor are not persons interested in the sale of ancestral property held in execution of a money-decree against their father so as to be entitled to apply for setting aside the sale under S. 294.

Persons entitled under S. 295 to rateable distribution in the assets realized by the sale may be entitled to apply under S. 294 for setting aside the sale.

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An application to set aside the sale under S. 294 must be made within 30 days from the date of the sale under Art. 166 of Sch. II of the Limitation Act.

No sale can be confirmed under Ss. 312 and 314, C. P. C., and become absolute until the expiration of such 30 days.

Where a sale, held in October 1887, was set aside under S. 294, C. P. C., upon an application made by the sons of the judgment-debtor in June 1888 long after the expiry of the 30 days prescribed by Art. 166 of the Limitation Act, and long after the sale was confirmed, the High Court might when the order setting aside the sale came to its notice in a case between the sons of the judgment debtor and the purchaser for recovery of possession, set aside the said order under S. 622, C. P. C.

A purchase made by the decree-holder without the permission of the Court is not void, but only voidable under S. 294, C. P. C.

When a sale is set aside under S. 294, C. P. C., the judgment-debtor who has been benefited by the satisfaction of the decree in whole or in part must make restitution.

The execution of the decree will be reopened, the purchase-money if paid must be refunded to the purchaser and the decree-holder will be held responsible for any deficiency in the price which may happen on the resale and for the expenses incidental thereto.

When restitution is impracticable as where the decree-holder purchaser has sold property to a person who has purchased it *bona fide*, a sale cannot be set aside under S. 294 at the instance of the judgment-debtor or of any person interested in the sale.

Second Appeal from the decree of the District Court of Salem in A. S. No. 258 of 1899, presented against the decree of the Court of the District Munsif of Salem in O. S. No. 246 of 1895.

P. S. Sivaswami Aiyar for appellants.

Respondents were not represented.

The Court delivered the following

JUDGMENT :—The 1st defendant sued the 1st and 8th plaintiffs and the 9th defendant in O. S. Suit No. 503 of 1885 on the file of the District Munsif's Court, Salem, on a mortgage bond executed by them, and in execution of the decree obtained therein, the mortgaged properties were sold on the 27th October 1887 and were purchased by the 2nd defendant, who was placed in possession of the same after the sale had been confirmed and certificate issued to him.

In April 1888, the 3rd defendant, father of defendants 4 to 7, became the purchaser of the property from the 2nd defendant and obtained possession of the same.

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In June 1888 plaintiffs 2, 3, 4, 5 and 7, all these minors, the sons of the 1st and 8th plaintiffs and of the 9th defendant applied under S. 294, Civil Procedure Code, to have the sale set aside on the ground, among others, that the 1st defendant himself purchased the property through his agent the 2nd defendant without having obtained the permission of the Court to bid at the sale. The District Munsif holding that the mortgage which had been made before the birth of the applicants was binding upon them, and that besides, their application was barred by the law of limitation, dismissed it on the 20th July 1888. The 3rd defendant also was a party to these proceedings. In appeal the order of the District Munsif was reversed and the application remanded (on the 23rd July 1890) for disposal on the merits. The District Munsif after going into the merits of the case, came to the conclusion that the 1st defendant himself was the purchaser, and holding that the 3rd defendant had no *locus standi* to take part in the proceedings and that he 'need not therefore recognize him as a necessary party at all to these proceedings,' set aside the sale by his order, dated the 28th September 1891 (Exhibit F). This order appears to have been confirmed on an appeal which was preferred by the 2nd defendant to the District Court.

Thereupon the plaintiffs and the 9th defendant applied to the District Munsif for restoration of possession from the 3rd defendant, but the application was rejected on the ground that their remedy was by a regular suit, and this order of the Munsif was also upheld on appeal by the District Judge (31st July 1894). Hence the present suit, instituted on the 25th April 1895.

The District Munsif decreed the plaintiff's suit by his decree, dated the 14th September 1896. On appeal by defendants 3 to 7, the then District Judge reversing the Munsif's decree remanded the suit to be disposed of on the merits, holding that the 3rd defendant was not bound by the order of the District Munsif (Exhibit F, dated the 28th September 1891), setting aside the sale inasmuch as the District Munsif in passing that order held that the 3rd defendant had no *locus standi* and was therefore not a necessary party at all. On this remand, the District Munsif, after framing and trying 17 issues, passed a decree in favour of plaintiff, 2 to 7 alone, adjudging to them their shares in the mortgaged

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property and dismissed the suit so far as it related to the shares of the 1st and 8th plaintiffs and the 9th defendant. This decree was confirmed on appeal by the (present) District Judge, and this second appeal is preferred by defendants 3 to 7 against that portion of the decree which adjudged to plaintiffs 2 to 7, their respective shares in the property.

The only findings of fact which alone need be noticed here and which are conclusive in this second appeal are that the mortgage debt is binding upon plaintiffs 2 to 7, that the 2nd defendant's purchase in the auction sale was benami for the 1st defendant, who admittedly did not obtain the permission of the Court under S. 294, and that the 3rd defendant purchased the property in good faith, for valuable consideration, from the 2nd defendant.

Plaintiffs 2 to 7 were not parties to O. S. No. 803 of 1885, and the application for setting aside the sale was not made by their fathers, viz., the 1st and 8th plaintiffs and the 9th defendant who alone were the judgment-debtors therein. The decree as such will not bind plaintiffs 2 to 7, and if in the present suit it had been established that the mortgage debt was not binding upon them, the sale in execution of the decree in O. S. No. 503 would not have affected their shares and they would have been entitled to the decree which has been passed in their favour. Under S. 294, Civil Procedure Code, the application for setting aside the sale may be made by the judgment-debtor or any other person interested in the sale. Persons entitled under S. 295 to rateable distribution in the assets realized by the sale and as such interested in the sale may be entitled under S. 294 to apply for setting aside the sale, and Art. 166 of the second schedule to the Limitation Act, 1877, prescribes a period of 30 days to be reckoned from the date of the sale, for making an application under S. 294, Civil Procedure Code, and under Ss. 312 and 314, Civil Procedure Code, no sale can be confirmed and become absolute before the expiration of the said period of 30 days. Plaintiffs 2 to 7 were neither judgment-debtors in O. S. No. 503, nor persons interested in the sale under the decree therein, and it was not therefore competent to them to intervene under S. 294 and apply for setting aside the sale,—and that, after the sale had been confirmed—and seek to avoid the sale as against the 3rd defendant who had become a *bonâ fide* purchaser for value without notice, prior to such application.

Even assuming that they could thus apply, they could not be in a better position than if they had been joint judgment-debtors with their fathers. If they had been so, the ordinary period of 30 days prescribed by Art. 166 of Act XV of 1877, would not by reason of their minority be prolonged by S. 7 of the Limitation Act inasmuch as at the time when the right to apply under S. 294 accrued, i. e., the date of sale, all the judgment-debtors were not minors. *Periasami v. Krishnayyan*¹.

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In cases in which under S. 294, a sale is liable to be set aside on the ground that the decree-holder himself made the purchase, directly or through another, the section only contemplates the setting aside of the sale in *total* and does not warrant its being set aside in *part*. The effect of setting aside a sale under S. 294, Civil Procedure Code, is that the judgment-debtor who has been benefited by satisfaction of the decree, either in whole or in part as the case may be, by reason of the sale sought to be set aside, has to make restitution by the execution of the decree being re-opened (and the purchase money if paid, being also refunded to the decree-holder purchaser), the decree-holder however being by law held responsible for any deficiency in the price which may happen on the resale, and for the expenses incidental thereto. But such restitution is impracticable in favour of a purchaser for value from the decree-holder or from the purchaser benami for the decree-holder. A purchase by the decree-holder, without the permission of the Court (whether made by himself or through another person), being, under S. 294, Civil Procedure Code, not void, but only voidable, it cannot for the above reasons be avoided against a transferee in good faith for valuable consideration, and this is in accordance with the principle of law that as a general rule, the right to avoid an avoidable contract is determined when the vendee has, before the vendor's election to avoid, transferred the property to a purchaser in good faith for valuable consideration (*Babcock v. Lawson*² affirmed on appeal *The Horlock*³ *Leake on Contracts*, 3rd Edition at p. 327). In the present case, it being found that the 1st defendant, the decree-holder in O. S. No. 503, purchased the property through the 2nd defendant, the purchase money must have been naturally paid into Court and drawn by the 1st defendant. Whether the decree was thus fully satisfied and whether out

1. I. L. R., 25 M. 431, F. B. 2. 5 Q. B. D. 284. 3. L. R. 2 P. D. 243.

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of the purchase money, any balance remained, which was paid to the judgment-debtors, it does not appear. If a sale could, under S. 394, be set aside as against a transferee in good faith for consideration—(like the 3rd defendant herein)—from the decree-holder purchaser, the result would be that the party seeking to set aside the sale would be in a more advantageous position than if the decree-holder purchaser had not transferred the property to a third person.

The plaintiffs in bringing the present suit do not even offer any restitution in favour of the 3rd defendant, who is the only contending defendant in the suit. In our opinion, the proceedings of the Court in O. S. No. 503 of 1885, setting aside the sale under S. 294, Civil Procedure Code, on application made by plaintiffs 2 to 7—and even that, long after the confirmation of the sale—cannot affect the 3rd defendant, who became a *bona fide* purchaser for value prior to the commencement of the proceedings instituted by plaintiffs 2 to 7 under S. 294, Civil Procedure Code. As already stated, the District Munsif in his final order, dated the 28th September 1891, setting aside the sale held that the 3rd defendant had no *locus standi* in respect of the proceedings and was therefore not a necessary party at all thereto. From the materials on record, it is not easy to determine whether notwithstanding such declaration by the District Munsif, the 3rd defendant should or should not legally be regarded as having been a party to the said order. If the correct view be that the 3rd defendant should in law be regarded as a party to the said order, it may be that the same should formally be set aside to entitle the 3rd defendant to an adjudication in this suit, inconsistent with the said order. The order of the District Judge, however, which confirmed the same was under S. 588, Civil Procedure Code, final and no appeal lay therefrom to the High Court, and it is therefore competent to the High Court to set aside such order under S. 622, Civil Procedure Code, as in either view the District Munsif in setting aside the sale, acted illegally and with material irregularity.

We accordingly set aside the order of the District Munsif (Exhibit F), dated the 28th September 1891 as also the order of the District Judge confirming it on appeal.

The only cause of action on which plaintiffs 2 to 7 could succeed in this suit is that the mortgage debt is not binding upon them and that therefore the sale is inoperative so far as their shares in the mortgaged property are concerned. But as they have entirely failed to establish this, and it has been practically conceded that they are bound by the mortgage debt the suit ought to have been dismissed.

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The second appeal is therefore allowed and in reversal of the decrees of both the lower courts, the plaintiff's suit is dismissed with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Murkanat alias Kattayat Pattumayi insane

by guardian and husband Murkanat

Umman Kutti Appellant* (1st
v. Defendant.

Palakhal Raman Menon and another ... Respondents (Plaintiff
and 2nd Defendant).

Civil Procedure Code, S. 244—Decree-holder purchaser—Application for delivery rejected—Suit for possession—Maintainability.

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v.
Palakhal
Raman.

A suit by the decree-holder-purchaser for possession of land against the judgment-debtor after a previous application by him under S. 318, C. P. C., for delivery of property has been rejected as barred as having been made more than 3 years after the confirmation of sale is barred by S. 244, C. P. C.

Muttia v. Appasami, I. L. R., 13 M. 504; *Lakshmana Chettiar v. Kannammal*, I. L. R., 24 M. 185; *Kasinatha Aiyar v. Uthumansa Rowthan*, I. L. R., 25 M. 529; *Madhusudandas v. Govinda Priachoudhrani*, I. L. R., 27 C. 34 followed.

Second Appeal, from the Decree of the Subordinate Judge's Court of South Malabar at Calicut in Appeal Suit No. 682 of 1900, presented against the Decree of the Court of the District Munsif of Ernad in O. S. No. 363 of 1898.

C. V. Ananthakrishna Aiyar for appellant.

B. Govindan Nambiar for respondent.

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The Court delivered the following

JUDGMENT:—The question which has been raised in this case is a pure question of law, and the facts on which it depends are beyond dispute. The question is as to the right of suit, and we have therefore to decide it, though it was not raised in the Courts below.

The plaintiff was the decree-holder in Original Suit No. 409 of 1880 and became purchaser of the plaint property which was sold in execution of that decree. He applied under S. 318, Civil Procedure Code, for delivery of the property purchased, but his application was rejected as barred by limitation having been made more than 3 years after the confirmation of the sale, and he brings the present suit to recover possession of the land from the defendant who was the judgment-debtor in C. S. No. 409 of 1880.

The appellant's Vakil contends that the suit is barred by S. 244, Civil Procedure Code. If the question were not already settled by more decisions than one of this Court and of the Calcutta High Court, we should entertain considerable doubt as to whether proceedings taken by a purchaser to obtain possession of the property purchased could be regarded as "relating to the execution, discharge or satisfaction of the decree" within the meaning of S. 244, Civil Procedure Code, when such proceedings could not possibly affect the execution, discharge or satisfaction of the decree.

It has, however, been decided in the case reported in *Muttia v. Appasami*, *Lakshmanan Chettiar v. Kannammal*¹, *Madhusundandas v. Gobinda Priachowdhrani*² and *Kasinatha Aiyar v. Uthumansa Rowthan*³ per Moore, J. that such proceedings between the decree-holder when he is the purchaser and the judgment-debtor are proceedings in execution of the decree and relate to its execution.

Following the authority of these cases we allow the second appeal and reversing the decree of the Lower Court restore that of the District Munsif dismissing the suit. As the plea on which the appellant succeeds was not taken in the Courts below, we leave each party to bear his own costs throughout.

1. I. L. R., 13 M. 504.

2. I. L. R., 24 M. 185.

3. I. L. R., 27 C. 34.

4. I. L. R., 25 M. 529.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Subrahmanyam ... Appellant* (*Plaintiff*).

v.

Venkamma and others... Respondents (*Defendants*).

Hindu Law—Adoption by widow—Sapinda's consent—Authority of husband, false to the knowledge of sapinda, effect of—Sapinda's consent, effect of, some consenting—Sapinda's consent, some not being applied to, effect of—Consent of one of several undivided sapindas, sufficiency of.

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Where the assent of a sapinda is obtained under the representation by the widow that she had authority from her husband and such authority turns out to be false, then the assent of the sapinda is inefficacious.

But if the sapinda knew the authority to be false, then his assent, if otherwise efficacious, may be valid.

In an undivided family the assent of the senior and managing member (or sapinda) may be sufficient.

In a divided family seniority has no bearing upon the validity of the assent.

The widow must apply for the assent of all the nearest sapindas and an adoption made with the consent of one, but without applying for the assent of another of the same grade, will be invalid though it may be that if application had been made he would have refused his assent.

Appeal from the decree of the District Court of Kistna in O. S. No. 12 of 1900.

T. V. Seshagiri Aiyar for appellant.

V. Krishnasami Aiyar and *K. Subramania Sastri* for respondents.

The Court delivered the following

JUDGMENT :—This is a suit to obtain a declaration that the adoption of the 2nd defendant by the 1st defendant—the widow of one Ramayya—is invalid on the grounds that the 1st defendant had no authority from her husband to make the adoption, and that the alleged assent of the 3rd defendant alone to the adoption is invalid

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and insufficient in law. The plaintiff and the 3rd defendant are divided brothers, being the nearest existing cousins of the deceased Ramayya, who died issueless about 20 years ago, leaving him surviving no undivided member of his family. The 2nd defendant, who is the son of a remote *gnati* of the deceased, was, shortly before the institution of this suit, adopted by the 1st defendant, who purported to adopt him in pursuance of her husband's oral authority and of the assent of the 3rd defendant and some other *gnatis*. The District Judge disbelieved the evidence as to the oral authority given by the husband, but upheld the adoption on the grounds that, according to the proper construction of the document (Exhibit III) executed by the 3rd defendant signifying his assent to the adoption, his consent was one given independently of the alleged authority of the husband, that such assent was not proved to have been given from corrupt motives, and that the assent of the 3rd defendant alone was sufficient in law inasmuch as "it would have been useless for the widow to have sought also the assent of the plaintiff who probably wanted one of his own sons to be adopted by her."

Notwithstanding the attempt made before us by the respondent's pleader to impugn the finding of the District Judge as to the alleged authority from the husband, we are quite satisfied that his finding is correct and that the oral evidence in support of the alleged authority is altogether untrustworthy. We also agree with the District Judge that the evidence is by no means sufficient to establish that the 3rd defendant's assent was procured for a pecuniary consideration.

The two questions which have been chiefly argued at length before us are (1) whether the 3rd defendant's assent is not null and void as having been given on a representation made by the widow that she had her husband's authority to make the adoption, and (2) whether the assent of the 3rd defendant alone is sufficient in law, either absolutely or under the circumstances of the case.

The principle of law applicable to the determination of the first question, as laid down by the Judicial Committee of the Privy Council in *Sri Raghunadha v. Sri Brozo Kishoro*¹ and in *Karu-*

1. L. R. 3 I. A. 154.

*nabdhi Ganesha Ratnamaiyar v. Gopala Ratnamaiyar*¹ and followed by this Court in *Venkatalakshamma v. Narasayya*² is that the assent of a sapinda to an adoption to be made by the widow of a deceased kinsman should be one given by him in the exercise of his discretion as to whether the adoption ought or ought not to be made by a widow not having her husband's authority to make the adoption and that, therefore, a sapinda's consent obtained by the widow upon a representation that she had received authority to adopt from her husband, when no such authority has in fact been given, is inefficacious in law. Applying this principle to the present case, the 3rd defendant's assent would undoubtedly be inefficacious if it could be regarded as having been influenced by the widow's allegation of authority from her husband.

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We are quite unable to concur with the District Judge in construing Exhibit III as the according of an independent assent by the 3rd defendant, whether the husband had given permission or not. On the contrary the document expressly recites that in asking the 3rd defendant to give his assent also, the widow's proposal to him was to make an adoption in pursuance of her husband's authority given to her in the presence of the 3rd defendant and other *gnatis*. The learned pleader for the respondents seeks to distinguish the present case from the cases above referred to, on the ground that if no authority had been given by the husband, as alleged, the 3rd defendant while giving his assent must have known perfectly well that no such authority had been given and the widow's representation, if any, that such authority was given, being one which must have been false to his knowledge, could not have influenced the exercise of his discretion in according his assent. Assuming that the alleged authority of the husband was false to the 3rd defendant's knowledge, the soundness of this contention must be accepted and the case would thus be clearly distinguishable. In the present case, no doubt, the 3rd defendant has given direct evidence in support of the alleged oral authority of the husband and he also stated in Exhibit III that the husband's authority was given in his presence. Though we concur with the District Judge in distrusting his evidence, it does not, however, necessarily follow from this circumstance that the

1. L. R. 7 I. A. 173.

2. I. L. R., 8 Mad. 545.

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3rd defendant himself really disbelieved the widow's representation, if any, that she had her husband's authority to adopt. It may be that, believing the representation to be true, he supported the widow by falsely stating and giving evidence that he himself was present when the alleged authority was given. But upon the whole evidence in this case, we are satisfied that he knew as well as the 1st defendant did, that the husband had given no authority whatever, but that the two acting in collusion against the plaintiff, invented the husband's authority—which the 3rd defendant was to support by his evidence—with a view to neutralizing the absence of the assent of his brother (the plaintiff) and thus avoid the risk—by no means an improbable one—of the adoption being upset on the ground that the 3rd defendant's assent alone was insufficient. We cannot, therefore, hold that the 3rd defendant's assent if otherwise sufficient is invalidated by the widow having falsely set up her husband's authority.

In approaching the consideration of the 2nd contention relied on in support of the appeal, we have to be guided chiefly by the decisions of this Court in *Parasara Bhattar v. Ranga Raja Bhattar*¹ and *Venkatakrishnamma v. Annapurnammah*². We may at the outset dispose of the assent alleged to have been obtained by the widow from a number of her husband's distant *gnatis*, with the remark that such of them as have been examined as witnesses in the case deny having given any such assent, and that even assuming it to have been given, such assent can be of no avail as the 1st defendant herself in her evidence states that she obtained their oral assent to the adoption by representing to each of them that she had her husband's authority.

In *Parasara Bhattar v. Ranga Raja Bhattar*¹, as in the present case, the adoption was made with the assent of only one of two sapindas of equal degree, who were divided between themselves and both divided from the deceased. In upholding the adoption on the ground that the non-assenting sapinda withheld his assent on improper grounds, this Court laid down the law applicable to the case as follows:— ‘ * * * *

1. I. L. R., 2 M. 202.

2. I. L. R., 23 M. 486.

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and where the only surviving members of the family are divided from the deceased husband for whose benefit it is desired to make the adoption, and also from each other and equally distant from the deceased, there seems nothing in principle to throw doubt upon the sufficiency of the assent of some of them, when *bona fide* given, if it be shown that the consent of the others is refused from interested or improper motives or without a fair exercise of discretion. In the present case the assent of both sapindas was sought and plaintiff's assent to a second adoption was not absolutely withheld, but it was coupled with a condition that the widow should adopt his 3rd son. In Suit No. 156 of 1869, he had stated that this boy was already given in adoption in another family. That assertion is found now to have been false (see Appeal No. 51 of 1879), but the widow, upon the ground stated, refused to make an adoption which might turn out to be invalid. It is clear that plaintiff's assent was subsequently withheld from purely interested motives, and the evidence shows that the assent of the 7th witness for plaintiff—who belongs to a branch of the family senior to that of plaintiff and who is at least equally entitled with the plaintiff to succeed to the reversion—was given with complete good faith and in the exercise of a deliberate discretion¹."

It will be observed that in the above case the non-assenting sapinda was applied to, by the widow, for his assent, but that he refused to give his assent unless she would adopt his own son, whom, according to his sworn deposition previously given in a Court of justice, he had already given in adoption to a third party and that the widow refused to make an adoption which might turn out to be invalid. In the present case, it is clear from the evidence of the 1st defendant herself that she never applied to the plaintiff for his consent. She says that she expressed a desire about 5 years ago to adopt the 2nd defendant, and that the plaintiff then said he would give his own boy in adoption, who being then 10 or 14 years old, was in her opinion too old to be adopted. Though according to her own statement, she went to the houses of all the *gnatis*, shortly before the adoption, she did not go to the plaintiff's house to obtain his assent. The plaintiff and some of the *gnatis*, on hearing that the 1st defendant was going to adopt the 2nd defendant, sent to her, about 10 days before the

1. I. L. R., 2 M. 206, 207.

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adoption, the following letter, by registered post—which, however, being refused by her, was returned to the plaintiff by the Post Office :—“ It is learnt from rumours you give rise to, that having fallen into evil ways and contrary to law and without authority or sanction from your husband or the nearest gnatis, and on the evil advice of Venkatappayya, you are going to adopt his son. Any adoption made in the said manner is not at all valid. Even if you should do so, our right of heirship cannot be lost. It is clear that you have no good intention in making this adoption but only the evil intention of allowing the property to go into other's possession ; such adoption will be caused to be set aside by a Court. So understand.” The plaintiff in his evidence says that he never asked the 1st defendant to adopt his son and that she never asked him for his assent for her making an adoption.

The learned pleader for the respondent urges 1st, that the assent of the 3rd defendant alone is sufficient in law, especially as he is the plaintiff's senior in age, and 2ndly, that even assuming that under ordinary circumstances the widow should have also sought for the plaintiff's assent, she need not have done so in the present case, as it was certain that he was hostile to her adopting the 2nd defendant and would, therefore, have refused his assent, even if applied to. Having regard to the deliberate dicta of the Privy Council in the *Ramnad¹ Chinnakimidi²* and *Guntur³* cases—in the first two of which the Judicial Committee disapproved of the proposition of Mr. Justice Holloway that the assent of any single sapinda would be sufficient—and the decisions of this Court in *Arundadi Ammal v. Kuppammal⁴*, *Parasara Bhattar v. Ranga Raja Bhattar⁵*, and *Venkatakrishnamma v. Annapurnamma⁶*, it is too late in the day to contend that the assent of the 3rd defendant alone, ignoring the plaintiff, would be sufficient. As regards the 3rd defendant's seniority that is quite immaterial. In an undivided family, no doubt, the senior in age having the status of managing member of the family, it may be that his assent alone, if given *bona fide*, will be sufficient and be equivalent to the assent of the family. But this consideration does not apply to cases where the assent has to be sought from divided kinsmen—especially when they are also divided as between themselves. Adverting to cases

1. 12 M. I. A. 397.

3. L. R., 4 I. A. 1, 13.

5. I. L. R., 2 M. 202.

2. I. L. R., 3 I. A. 154.

4. 3 M. H. C. R. 283.

6. I. L. R., 23 M. 496.

in which the deceased husband died a separated member and there is no father-in-law alive, the Judicial Committee in the *Guntur* case (I. L. R., I M. 174 at pp. 190-191) explained their dictum in the *Ramnad* case as follows :—

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“ All which this Committee in the former case intended to lay down was, that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband.” The expression ‘family council’ in the above extract is no doubt rather too general and comprehensive. It is not probable that it was intended to include the whole circle of sapindas and samanodakas or to imply that they should assemble. The presumptive reversionary heir or heirs are the nearest of kin to the deceased husband and as such the natural advisers of the widow ; and if his or their assent be obtained and the same be given *bona fide* and not from any corrupt motive, that would be sufficient authority on which she could act, and it would not be necessary that she should seek the assent of remoter reversionary heirs. The two cases *Parasara Bhattar v. Ranga Raja Bhattar*¹ and *Venkatakrishnamma v. Annapurnamma*², evidently proceed on this view, though it does not appear from the report whether or not there were remoter reversionary heirs in existence. If the presumptive reversionary heir or heirs withhold his or their assent from improper motives, the widow may validly act upon the assent given *bona fide* by remoter reversionary heirs. Adverting to cases in which a majority give or withhold assent and a minority withhold or give assent, Justice *Subrahmania Aiyar* in his judgment (concurring in by *Moore, J.*) in *Venkatakrishnamma v. Annapurnamma*¹ observed as follows : —(at p. 488) “ It should, at the same time, be borne in mind that a mere numerical majority, whether in favour of or against an adoption, will not by itself determine the question. Adoption being a proper act, it will be presumed that when the majority give their assent, such assent was given on *bona fide* grounds. If, however, it be shown that the majority give or withhold their assent from

1. I. L. R., 2 M. 202.

2. I. L. R., 23 M. 486.

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improper considerations, such assent or dissent will be of no avail to the party relying on it." In the above case, there were four reversionary heirs of equal degree, three of whom gave assent, but the fourth withheld his assent, without communicating to the widow either at the time he was asked to assent or subsequently, what the reasons for his refusal were and the adoption was upheld on the ground that the sapinda who refused "to give his reasons for the opinion why an heir by adoption should not be substituted, while other sapindas decide in favour of such substitution, cannot be held to exercise properly the discretion confided to him. His opinion against the adoption must be put entirely out of consideration as capricious or prompted by undue considerations."

In both the above cases, the widow had sought the advice and assent of all the presumptive reversionary heirs and the adoption was upheld, though one of the two in the first case withheld his assent—but on an improper ground—and one of the four, in the latter case, withheld his assent—but without giving any advice or reason. In the present case, it is argued that though the plaintiff's assent was not sought for, at or about the time of the adoption, yet inasmuch as he would have refused to give his assent, it must be taken that his assent was applied for and refused. It is, however, impossible to accede to this argument. If it was her duty to seek the assent, not only of the 3rd defendant, but also of his brother (the plaintiff), she cannot be regarded as having discharged her duty because, in her opinion, she would have made an application to the plaintiff but in vain. The very object of enjoining a widow to seek and act under the advice of her husband's sapindas will be defeated if she does not give an opportunity to the sapindas concerned to advise her against making an adoption or against adopting a particular boy. It may be that if the sapinda who is supposed to be opposed to the adoption be consulted, his advice against the adoption will be effective upon the widow or it may be that the widow's explanation will induce him to change his mind and give his assent. Whether the deponent was conscious of it or not, we think there is much truth and force in the following statement of the plaintiff in his deposition:— "I was not asked to give consent to the adoption. I cannot say what I would have done if I had been asked." In answer to questions put to the plaintiff as to the allusion made in his

notice—(Exhibit I already referred to)—to the 1st defendant having fallen into evil ways, he stated as follows :—“The minor’s (2nd defendant’s) natural father was familiar with the 1st defendant and so I wrote as I did in the letter. I suspected her conduct.” It would have been perfectly legitimate on the part of the plaintiff to dissuade the widow from adopting the 2nd defendant if he had reason to believe that such adoption would lead to scandal and bring disrepute on the family. If she had applied to him for his assent and he withheld the same, with or without assigning reasons, and she had nevertheless made the adoption relying on the assent of the 3rd defendant alone, we should then be in a position to decide whether the plaintiff withheld his assent properly or improperly and capriciously. But it is clear from the action of the 1st defendant in refusing to receive the letter which was sent to her by registered post, that she was determined to ignore him and not care for his advice or even give him an opportunity to advise her. The plaintiff says in his evidence that he never asked the 1st defendant to adopt one of his sons. But, assuming, as the 1st defendant says, that some 5 years before the adoption the plaintiff wanted her to take one of his sons in adoption, there is nothing improper in a sapinda proposing to give his assent to the widow adopting his own son if such son be the nearest sapinda, and refusing to give his assent to her adopting a stranger or a distant sapinda, if there be no reasonable objection to the adoption of his own son—as for instance in the case of *Parasara Bhattar v. Ranga Raja Bhattar*¹.

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For the above reasons the adoption of the 2nd defendant made by the 1st defendant with the assent of the 3rd defendant alone is invalid. The appeal is therefore allowed and, in reversal of the decree of the Lower Court, judgment is given for the plaintiff with costs throughout, declaring the adoption of the 2nd defendant by the 1st defendant to be invalid.

1. I. L. B., 2 M. 202.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Kasturi and others ... Appellants*
 (Defendants 8, 9, 10,
 v. 11 and 14).

Anantharam Thivari and others ... Respondents
 (Plaintiffs and De-
 fendants 1 to 7, 12,
 13, 15 and 16.)

Kasturi v. Anantharam Thivari. *Government paying Mohini to trustees—Direction by Government to ryot to pay first crop assessment—No assignment of public revenue—Title to sue in the name of trustees—Revenue Recovery Act II of 1864, Ss. 2 and 42—Personal claim—No rent—Limitation Act, Arts. 110 and 120—Rent Recovery Act.*

An arrangement by which the Government directs its ryot to pay to certain trustees of a mutt first crop assessment on the land instead of itself paying cash to the said trustees is not an assignment by Government of the public revenue to the trustees.

*Krishnasami v. Venkatarama*¹, referred to.

The trustees on default by the ryot in paying the assessment should bring the matter to the notice of the revenue authorities, and it would be competent to the latter to realize the arrear under Act II of 1864 (Madras) and pay it over to the trustees, but the latter will not be entitled to sue in their own name for the amount.

Ss. 2 and 42 of the Revenue Recovery Act are applicable only to public revenue and not to realization of sums due to an institution like the plaintiff's mutt.

If the trustees are entitled under the arrangement to sue, in their own names their claim is only a personal one against the holders of the land for the time being.

Where the trustees are not constituted Inamdars but are entitled under the arrangement to sue in their own names for the first crop assessment, their claim is not one for rent within the meaning of the Rent Recovery Act or Art. 110 of the Limitation Act. Such a claim falls under Art. 120 of the Limitation Act.

Where the trustees obtained a decree personally for their claim against the representatives of the original ryot, who agreed with Government to pay over first crop assessment to the trustees, the latter are not entitled also to a decree personally against the transferees who were possessed of the land.

Second Appeal from the decree of the Subordinate Judge's Court of Negapatam in A. S. No. 450 of 1899 presented against the

* S. A. No. 1139 of 1900.

25th November 1902.

I.L. L. R., 13 M. 319.

decree of the Court of the District Munsif of Trivalur in O. S. No. 75 of 1898.

Kasturi
v.
Anantharam
Thivari.

P. S. Sivaswami Aiyar for appellant.

T. V. Seshagiri Aiyar for *V. Krishnaswami Aiyar* and
V. Ramesam for respondents.

The Court delivered the following

JUDGMENT :—Until 1863 the Government was paying from the Public treasury in cash Rs. 233-5-3 to the trustees of a charitable mutt, of which the plaintiffs are the present trustees. In 1863 the Government in lieu of the cash payment directed the predecessor of defendants 1 to 4, who was the holder on ryotwari tenure of 5 and odd velis of land, to pay the first crop assessment payable on the land amounting to Rs. 233-5-3 to the trustees of the mutt instead of to the Government revenue officers and obtained from him an agreement (Exhibit D) that he would do so, and from that time the trustees were apparently collecting the said amount and the Government was collecting the 2nd crop assessment on the land amounting to Rs. 120 as well as the whole of the land-cess and village-cess from defendants 1 to 4 and their predecessors. In 1893, at the time of the revision of the Tanjore assessment, the assessment for the 1st crop was raised to Rs. 299-8-0, the difference (Rs. 66-2-9) between that and the former assessment being payable to Government direct.

The plaintiffs bring this suit to recover Rs. 709-8-6, being the amount payable under the arrangement made in 1863 in respect of faslis 1303 to 1306 inclusive. They seek to recover this both personally from defendants 1 to 4 and as a charge on the said 5 and odd velis of land, portions of which have now passed into the hands of defendants 6 to 16.

The District Munsif gave a personal decree against defendants 1 to 4 only and dismissed the suit in other respects.

On appeal by the plaintiffs to the Subordinate Judge, he held that the plaintiffs were entitled to a charge on the land and gave a decree against all the defendants to that effect, affirming also the personal decree against defendants 1 to 4.

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This second appeal is made by defendants 8 to 11 and 14 alone. The principal contentions raised by them are that the plaintiffs, even if entitled to maintain the suit, have no charge on the land, and that if so, the period of limitation applicable is 3 years, the suit being one for rent and is therefore barred except as against the 2nd defendant, who has given an acknowledgment of liability which saves the bar as against him.

In support of the Subordinate Judge's judgment the learned pleader for the 1st and 2nd respondents relies on the decision of this court in the case reported in *Krishnasami v. Venkatarama*¹. In the absence of the necessary materials bearing on the question, some of which are referred to in Exhibit D, we are unable to express a definite opinion on the point, but we are inclined to agree with the view there taken by Mr. Justice *Shephard*, viz., that by the similar arrangement made in that case in 1863 the Government did not part with its right to the revenue, and the fact that a portion of the public revenue was temporarily appropriated by Government to a demand against the public treasury did not deprive such portion of its character as public revenue. It is clear that the Government revenue was not assigned to the trustees as Inamdars in respect of the holding, and the very fact that the Government did not direct the ryot to execute the muchilka Exhibit D, in favour of the plaintiff's mutt, but took it in its own favour clearly indicates that there was no transfer of the rights of Government to the plaintiffs, and it would probably be open to Government at any time to substitute any other arrangement for that made in 1863. In this view whenever the ryot fails to pay the said assessment to the trustees of the mutt, the latter should bring the matter to the notice of the revenue authorities, and it would be competent to them to realize the arrear under Act II of 1864 (Madras) and pay it over to the trustees. This view, however, was not put forward either in the pleadings or in the courts below, and defendants 1 to 4 have not appealed to the Lower Appellate Court and have not taken any part in bringing this second appeal. The case has therefore to be disposed of on the footing that the plaintiffs were assignees from Government of the said annual amount of Rs. 233-5-4 entitled to sue in their own names. In this view it is clear that the

1. I. L. R., 18 M., 319.

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amount which they now seek to recover is not public revenue, but an income due to the mutt though the right of the mutt to such income originated in a grant or arrangement made by Government. Ss. 2 and 42 of the Revenue Recovery Act are applicable only to public revenue and not to the realisation of sums due to an institution like the plaintiff's mutt. The plaintiffs can therefore enforce their claim only as a personal one against the holders of the land for the time being who, if there had been no assignment in favour of the plaintiffs, would have been obliged to pay the amount in question as land revenue to Government according to their respective shares. In the view that the plaintiffs have not been constituted Inamdars so as to create the relation of land-holder and ryot between themselves and pattadars, the claim made by the plaintiffs cannot be regarded as one for rent either for the purposes of the Rent Recovery Act or for the purposes of Art. 110 of Schedule 2 of the Indian Limitation Act, 1877. There being no special article applicable to a claim, such as the present, it falls under the general Art. No. 120, which prescribes six years from the date of the cause of action and the claim therefore as a personal one is not barred. As only some of the defendants have preferred this second appeal, viz., defendants 8 to 11 and 14, the decree appealed against will stand so far as the other defendants are concerned. The 9th defendant was a purchaser of a part of the land in revenue auction sale, and no part of the sum claimed in the plaint accrued due subsequent to his purchase. The 11th defendant is only a mortgagee and as such is not liable for the Government revenue and therefore for the plaintiff's claim. As regards defendants 8, 10 and 14, they were no doubt in possession of portions of the land during fasli 1306 and as such would be personally liable to pay severally the revenue falling due on their respective portions, but as the plaintiffs have obtained a decree which has become final in the Original Court personally against defendants 1 to 4 in respect of all the lands for the whole of fasli 1306, the plaintiff cannot obtain a further decree against defendants 8, 10 and 14 for a portion of the same amount. The Second Appeal as regards all the appellants is therefore allowed. The plaintiffs will pay the costs of the appellants in this and in the lower appellate Court. The decree of the lower appellate Court will be modified accordingly and affirmed in other respects.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Jambu Chetty and another	...	...	Appellants*
			(Defendants).
v.			
N. P. L. N. Palaniappa Chettiar...	...	...	Respondent
			(Plaintiff).

Jambu Chetty *Negotiable Instruments Act, S. 94—Debt—Creditor accepting bill or note—Conditional*
v. *or absolute payment—Presumption—Discount in addition to interest for trouble in*
Palaniappa *realization—Negotiation—Additional security—Notice of dishonor—Drawee prima-*
Chettiar. *rily liable—Lapse of a reasonable time—Notice not necessary—Pleadings—Necessity*
of averment—Discharge.

Where there is a debt and the debtor gives a note, bill, or hundi for the debt, it is a question of fact in each case whether the parties intend the same as absolute or conditional payment. The *prima facie* presumption as to the effect of giving and taking a note or bill is that the debt is conditionally paid and not satisfied.

Where the creditor is allowed a discount of 2½ per cent. on the amount of the hundis in addition to interest which is more than a reasonable compensation for the trouble to be taken by the creditor in realizing the hundis, payment is absolute and not conditional.

The mere negotiation of the note or bill and the taking of an additional security are consistent with either case.

Where the bills were given as an absolute payment, the creditor cannot sue on the original debt or cause of action.

Notice of dishonour must be given even to a drawer though he may be primarily liable where the drawee does not accept.

S. 94 of the Negotiable Instruments Act recognises that the person to whom notice of dishonor is given should be informed not only that the instrument was dishonored and in what way, but also "that he will be held liable thereon."

Notice of dishonor must be given within a reasonable time after dishonor.

A person who says that notice of dishonor is not necessary is averring an exception to the general rule, and must, if he wants to rely upon the same, allege the special circumstances which constitute the exception in the pleadings.

Where either due notice of dishonor is not given or is given after the lapse of a reasonable time the person liable in case of dishonor will be discharged.

Appeal from the decree of the Subordinate Judge's Court of Jambu Chetty
Madura (West) in O. S. No. 14 of 1900.

v.
Palaniappa
Chettiar.

V. Krishnaswami Aiyar and S. Srinivasa Aiyar for appellant.

P. S. Sivaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT :—This is an action for the recovery of the sum of Rs. 5,421-14-10, being the balance alleged to be due on accounts for goods sold and sums lent from time to time, by the plaintiff to the 1st defendant. The 1st defendant admitted his liability only to the extent of Rs. 521-3-9 and objected among other items to his having been debited by the plaintiff with the several sums of Rs. 1,547-4-9, 1,500-0-0, 1,765-8-3, and 1,100-0-0, being the amounts of 4 hundis drawn by the 1st defendant in favour of the plaintiff, which were dishonoured by the drawee at Rangoon. The Subordinate Judge overruled the defendant's objection, and gave a decree in favour of the plaintiff as sued for. The defendants appeal against that decree and urge in support of their appeal that the plaintiff having accepted the hundis in discharge of the debt due to him, he cannot sue upon the consideration for the hundis, and that his remedy, if any, is upon the hundis. Apparently, the 1st defendant contended in the Court below that the hundis had not only been accepted in discharge of the debt, but that the same were accepted as cash payment in consideration of a discount of 2½ per cent. on the amount of the hundis, and that, therefore, the plaintiff had no cause of action against him either on the original debt or upon the hundis, he, the plaintiff, having taken the risk of their being dishonoured by the drawee. Upon the evidence in the case, we are clearly of opinion that the 1st defendant has entirely failed to establish that the hundis were treated and accepted as cash payment. As we understand the learned pleader for the appellants, his contention in this court is only that the hundis were taken as absolute payment and that the plaintiff cannot therefore sue upon the original consideration. He argues that unlike a promissory note, the giving of a bill or hundi *prima facie* operates as absolute payment of the debt and that the onus is upon the party affirming the contrary to show that the parties intended it to operate only as a conditional payment. We think

Jambu Chetty that there is no distinction in this respect between a note and a bill, and no authority has been cited to us in support of such a distinction.

Whether it be a note or a bill, it is a question of fact in either case, whether the parties intended the same as absolute or conditional payment, and the presumption is that the effect of giving and taking a note or bill is that the debt is conditionally paid. As stated by the Master of the Rolls in *In re Romer and Haslam*¹, it is perfectly well-known law, which is acted upon in every form of mercantile business, that the giving of a negotiable security by a debtor to his creditor operates as a conditional payment only, and not as a satisfaction of the debt, unless the parties agree so to treat it.

It is next urged that the evidence in the case shows that the parties intended the hundis to operate as absolute payment of the debt, and in support of this contention reliance is chiefly placed upon the plaintiff having been allowed a discount of $2\frac{1}{2}$ per cent. upon the amount of the hundis in addition to interest from the date of the hundis, at the current rate prevailing in Rangoon, which it is shown was higher than the local current rate.

The 1st defendant in his written statement expressly relied upon this circumstance in support of this contention, and on this point also cross-examined the plaintiff's 6th witness who was plaintiff's agent at that time. The witness stated that discount was allowed to cover risks in connection with the realization of the hundis and that it is allowed in every case. .

The evidence given by the 1st defendant on this point was, that for cashing Rangoon hundis the highest discount is $\frac{3}{4}$ per cent., but that he consented to pay $2\frac{1}{2}$ per cent. in regard to the hundis in question, because the plaintiff was to have the risk in case Kadar Ravathan (the drawee) proved insolvent. There was no cross-examination of the 1st defendant on this point, nor was any explanation elicited in the re-examination of the plaintiff's 6th witness. The allowing of $\frac{3}{4}$ per cent. discount may be regarded as a reasonable compensation for the trouble to be taken in realizing at Rangoon the amount of a hundi drawn and given in Madura ;

1. (1893) 2 Q. B. at page 296.

but 2½ per cent. cannot reasonably be regarded merely as such compensation, and it clearly shows that the plaintiffs calculated upon making a clear profit of about 2 per cent. by taking the bill in discharge of the debt, without at the same time running any real risk, inasmuch as he would have his remedy against the 1st defendant, upon the bills, if the same were dishonoured at Rangoon. And it is fairly certain that the plaintiff's action would have been based upon the hundis, but for his having been probably advised that such action would be sure to fail for want of due notice of dishonour.

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The inference to be drawn from the comparatively high rate of discount is strengthened by the evidence of the plaintiff's 6th and 3rd witnesses. The former says that the 1st defendant sometimes paid the plaintiff's firm in cash and sometimes by a bill, the amount of which was credited to him in the plaintiff's account.

If the bill were dishonoured the 1st defendant would pay the amount of the bill or he would be debited with the amount thereof, and the plaintiff's account clearly shows that the 1st defendant was first credited with the accounts of the four hundis in question, and afterwards debited with the same after the plaintiff failed to realise them. The evidence of this witness as to the interview he had with the 1st defendant at Madura after he received information of the hundis having been dishonoured, and the evidence of the 3rd witness as to what passed between him and the 1st defendant at Rangoon in reference to these hundis after they had been dishonoured when the 1st defendant went to Rangoon, clearly go to show, that the plaintiff accepted the hundis unconditionally, with the intention of enforcing his remedies thereunder, if the same should be dishonoured and not with the intention of suing the 1st defendant upon the original consideration.

We cannot accede to the appellant's contention that the fact of the plaintiff having negotiated two of the hundis shows that the hundis were given and taken as absolute payment, nor can we accede to the respondent's contention that the giving by the 1st defendant of certain bundles of cloth to the plaintiff as collateral security for the hundis, the bundles of cloth being deliverable to the drawee only after the hundis were honored by him, is inconsis-

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tent with hundis having been accepted as absolute payment. The negotiation of the hundis is equally consistent with their having been given and taken as absolute payment or as conditional payment, and as, at the commencement of the action, the two hundis were not outstanding in the hands of third parties, but were in the plaintiff's possession, who was thus in a position to hand over the bills to the defendant, he could bring an action on the consideration, if the bills in this case were taken as conditional payment *Davies v. Reily*¹.

The giving of additional security for the hundis is a circumstance not inconsistent with their having been accepted as absolute payment, but rather tends to confirm the inference that they were given and taken as such. For these reasons, the conclusion we have come to is, that the four hundis in question were accepted as absolute payment of the debt, and that the plaintiff therefore cannot sue upon the original debt even in the view that they were given and taken as conditional payment of the debt, the plaintiff cannot maintain this action as he was guilty of laches in respect of the same, and they must therefore be treated as absolute payments, and as between the 1st defendant the debtor and the plaintiff the creditor the debt is discharged.

We cannot accede to the respondent's contention that inasmuch as the drawee did not accept the bills, and the 1st defendant, the drawer, therefore, was primarily liable, the plaintiff was under no obligation to give notice of dishonour to the 1st defendant. Section 94 of the Negotiable Instruments Act, 1881, recognises that the person to whom notice of dishonour is given, should be informed not only that the instrument has been dishonoured, and in what way, but also "that he will be held liable thereon."

Upon the evidence of the plaintiff's 6th and 3rd witnesses, we hold that notice of dishonour was not given either in express terms or by reasonable intendment by informing the 1st defendant that he would be held liable thereon, and we also hold that such imperfect notice as was given was not given within a reasonable time after dishonour (*vide* sections 105 and 106, Negotiable Instruments Act; also; S. A. No. 967 of 1900). The result, therefore, is

1. 1898 (1) Q. B. p. I.

that the plaintiff cannot sue the 1st defendant for the debt any more than on the bills. The respondent's pleader relies upon para 12 of the Judgment of the Subordinate Judge and on clauses *a, c and g*, of section 98 of the Negotiable Instrument Act, and contends that no notice of dishonour was necessary. If the plaintiff relied upon any of these three exceptions to the general rule as to the necessity of giving notice of dishonour, he ought to have made the necessary averments in the pleadings and established the same. Neither in the pleadings nor in the issues has he relied either generally or specially upon all or any of these three exceptions, and we cannot permit him to raise them now, as each of them involves questions of fact which can be satisfactorily tried only by framing additional issues. We may also add that the evidence to which our attention has been drawn is far from making out clearly any of these exceptions. In the view, however, which we have taken of the main question involved in the case, *viz.*, that the bills were given and taken as absolute payment, it becomes unnecessary to remit such additional issues for trial, even if we were otherwise disposed to do so.

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Chettiar.

The Subordinate Judge's view that the provisions of the Negotiable Instruments Act are not, or at any rate, ought not, to be strictly applied to natives is manifestly unsound and untenable. If any local usage relating to bills and notes in an Oriental language, the operation of which usage is saved by section 1, though such usage may be at variance with the Act, be relied upon, such usage should be alleged and established by the party relying upon it.

The appeal, therefore, is allowed with costs and the decree appealed from varied accordingly.

Both parties agree that the plaintiff should have a decree for Rs. 521-8-9, the amount admitted by the defendants in the court below, with interest at 6 per cent. from date of plaint till payment. Each party will pay and receive proportionate costs in the court below.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Veerasokkaraja minor represented
by the Collector of Salem as
Agent to the Court of Wards ... Appellant* (*Petitioner*
2nd Defendant.)
v.

Papiah Respondent (*Counter-
Petitioner Plaintiff.*)

Veerasokkaraja v. Papiah. *Hindu Law—Hindu dying—Debts no charge on inheritance—Representative not bound to pay rateably—Civil Procedure Code S. 252—Due application of assets—Debt due by deceased to representative—Representative's right to pay himself out—Payments to the full value—Assets in possession of representative cannot be proceeded against—Position of executor—Jewels pledged by deceased—Redemption by representative with own funds—Lien unsecured creditors of a Hindu have no charge or lien on the inheritance.*

The heir and legal representative of the deceased coming into possession of the deceased's assets is not bound to pay each and every creditor *rateably*. S. 252, C. P. C., only provides that the representative can be proceeded against personally to the extent to which he has failed to apply the assets duly.

An heir paying debts but not paying the creditors *rateably* has not failed to apply assets duly within the meaning of S. 252, C. P. C. Every payment on account of a debt is a perfectly lawful payment irrespective of its effect upon other creditors and will be a due application of the assets within the meaning of S. 252.

There is no analogy between the position of an executor governed by the special provisions of the Indian Succession Act and that of the legal representative under the Hindu Law in respect of the distribution of assets.

Where payments have been made by the representative to the full value of the property that has come into his hands, creditors cannot proceed against such property on the mere ground that the representative is still in possession of property originally belonging to the deceased.

*Ram Golam Dobe v. Ayma Begum*¹ followed.

Where certain jewels were pledged by the deceased and the representative redeemed them with his own money he is entitled as against the creditors to a lien with respect to the amount paid by him for redemption. The representative is not a mere volunteer in so redeeming with his own funds.

Where a debt is due by the deceased to the representative the latter is entitled to pay himself out of the assets as he cannot sue himself.

* A. A. O. No. 89 of 1902.

9th December 1902.

1. 12 W. R. C. R. 177.

Appeal from the order of the District Court of Salem, dated the 28th February 1902 in C. M. P. No. 34 of 1901, in E. P. No. 46 of 1900 in O. S. No. 32 of 1898.

Veerasokka-
raja
v.
Papiah.

T. Subramania Aiyar for appellant.

P. R. Sundara Aiyar for respondent.

The Court delivered the following

JUDGMENT :—SUBRAHMANIA AIYAR, J.—The decree in execution of which the present question arises was obtained by the respondent on a promissory note against the appellant as the son and heir and legal representative of his mother, the executant of the promissory note, the decree directing payment from the estate of the deceased debtor. The respondent having attached certain jewels of the deceased in the possession of the officers of the Court of Wards who were in charge of the estate of the appellant (a minor), a claim was put forward on behalf of the appellant to the effect that the respondent as attaching creditor was entitled to only so much of the sale proceeds of the jewels as might exceed the sum of Rs. 1,562 due to the appellant (made up of Rs. 361 paid after the death of the appellant's mother for the redemption of two of said jewels from the creditor to whom they had been pledged by her and of Rs. 1,091 also paid subsequent to the mother's death to certain of her other creditors and Rs. 110 advanced to the mother out of the appellant's own funds some time before her death). The District Judge without going into the truth of the alleged payments held that the claim was not legally sustainable.

The questions raised in the argument before us were whether it was the duty of the appellant and those entitled to act on his behalf in the matter to pay his mother's creditors *rateably* out of the assets left by her and whether the appellant is entitled to any and what portion of the sale proceeds of the attached jewels which appear to have been sold with the consent of the parties subject to the decision of the appellant's claim.

It is now settled that unsecured creditors of a Hindu have no charge or lien on the inheritance. No text or other Hindu Law authority has been cited in support of the contention that an heir and representative such as the appellant was, in applying the ancestor's assets in his hands towards the discharge of the ancestors

Veerasokka-
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Aiyar, J.

debts, bound to pay each and every creditor *rateably*. Nor is there any statutory provision to that effect. The effect of S. 252 of the Civil Procedure Code is only that the representative can be proceeded against personally to the extent to which he has failed to apply the assets duly. It is scarcely necessary to say that it does not follow from this that if payment is not made by the heir *rateably* he has failed to apply the assets duly. The cases cited for the appellant (*Syed Jafer Hussain and others v. Hingan*¹, *Joogul Kishone Singh v. Kalee Chumsingh*², *Kattala Uppi v. Thangara Varma Rajah of Kottayatu Padinhari Kovilagam*³) proceed on the clear assumption that every payment on account of a debt is a perfectly lawful payment irrespective of its effect upon the other creditors, and would be a due application of the assets within the meaning of the section. That assumption is made for the obvious reason that the principle of distributing among the general body of creditors the whole of the available assets *rateably* is unknown to the law except where it has been introduced by express legislation. If in the absence of adequate legislation on the point, we should hold that a legal representative such as the appellant is bound to distribute assets coming to his hands *rateably* only, we should be adopting a rule which though just in the abstract would yet, as is obvious, be attended with serious difficulties in its practical application. This is a consideration which ought not to be overlooked, for whether it is workable is, in the language of Lord Robertson in *Janson v. Driefontein Consolidated Mines Co., Limited*⁴ "one of the tests of any legal doctrine."

It is hardly necessary to say that there is no analogy whatever between the case of an executor who is governed by the special provisions of the Indian Succession Act and that of the appellant as a legal representative under the Hindu Law, with reference to the question of the distribution of the assets among creditors; nor has the passage cited from Domat (Volume II, page 107) any bearing on the present case as the heir referred to therein seems to be subject to a rule peculiar to the Roman Law. In my opinion, therefore, the answer to the question under consideration should be in the negative.

1. 8 W. R. 161.

3. 3 M. H. C. R. 161.

2. 25 W. R. 224.

4. L. R. 1902 A. C. 505.

As to the next question, it was urged on behalf of the respondent that as the jewels themselves are still in the hands of the appellant, the respondent is entitled to proceed against them as assets undisposed of, without reference to any payments made by him or on his behalf to other creditors. Now, supposing that the Court of Wards had caused the jewels to be sold by auction and purchased them with the minor's other funds in their hands and paid the sale proceeds to the mother's creditors it would be impossible to contend that the jewels were still undisposed of assets on the ground that they still remained in the possession of the minor. In cases like the present the thing to be considered is the real effect of what has been done and not whether the property which originally belonged to the deceased is still with the representative. *Ram Golam Dobey v. Ayma Begum*¹ relied on by the appellant is a clear authority in favour of this view. There *Loch and Macpherson, JJ.* held that when a defendant against whom a decree had been passed in his representative capacity had made payments in satisfaction of the decree to the full value of the property of the deceased which had come or which might have come to his hands, the decree could no longer be executed even though the defendant had still in his possession property which originally belonged to the deceased.

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raja
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Aiyar, J.

The good sense of the reasoning on which this decision rests, even were the question *res integra*, would induce one to adopt the same view. It may be added that the present is eminently a case for raising the presumption that the payment was made on behalf of the appellant as representative of his mother inasmuch as he himself is incapacitated and the persons making the payment are public servants bound to proceed in the matter according to the provisions of S. 17 of Regulation V of 1804 with the sanction of the Court of Wards. To hold otherwise would be to unjustly mulct the appellant to the extent of the payments already made.

Apart from this ground so far as the sum of Rs. 361 said to have been paid for the redumption of the two jewels is concerned, the appellant is in my opinion entitled to a lien on those jewels for the amounts so paid.

This payment if true was not a payment by a new stranger. It was one made in the course of getting possession of the deceased's

1. 12 W. R., 177.

Veerasokka-
raja
v.
Papiah.
—
Subrahmania
Aiyar, J.

assets which the appellant had to dispose of in accordance with the law. In Sheldon on Subrogations it is stated on the authority of certain decisions in America (where under the initial guidance of Chancellor Kent the doctrine of Subrogation derived from the Civil Law has been developed more fully than in England) that the wife and children of a deceased who pay valid demands against his estate have been held not to be mere volunteers and may be subrogated (See 2nd edition page 368). The reason for the application of the principle to such cases would seem to be well expressed in the following passage quoted by the author referred to at pp. 368 and 369 from a judgment of *Thompson C. J.*: "I regard the doctrine as applicable in all cases where a payment has been made under a legitimate and fair effort to protect the ascertained interests of the party paying, and where intervening rights are not thereby jeopardized or defeated. Such payments, whatever their effect may be at law in extinguishing the indebtedness to which they apply will not be so regarded in equity, if contrary to equity to regard them so."

Here no right of the respondent has been jeopardised or defeated by the payment made for redeeming the jewels and it is but equitable that creditors like the respondent who wish to take advantage of the redemption should do so only subject to the condition of paying what they would have had to pay, were they themselves redeeming the property.

In regard to the Rs. 110 said to have been advanced to the mother in her lifetime, the appellant has a right to pay himself out of the assets as he cannot sue himself.

It follows that the appellant is entitled to be paid out of the sale-proceeds the sums which he proves he is entitled to, in the view of the law stated above and that the respondent is only entitled to the remainder.

I would, therefore, set aside the order of the District Judge and would remand the case for enquiry into the truth of the allegations made on behalf of the appellant and for disposal on the merits.

Costs in this court should abide the result.

DAVIES, J.:—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*.

Sami Aiya	...	...	...	Petitioner*
v.				(1st Accused).
The King Emperor	...	...	...	Respondent.

Criminal Procedure Code, S. 423—Charges of theft, rioting, hurt, &c.—Acquittal on charge of theft—Conviction on other charges—Appeal by the accused—Setting aside of acquittal—Dacoity—Commitment to Sessions.

**Sami Aiya
v.
King
Emperor.**

In the absence of dishonest intention a charge of theft cannot be sustained.

It is not competent to an Appellate Tribunal (at any rate one other than the High Court) to set aside an acquittal under S. 423, Cr. P. C.

Where, therefore, a 2nd Class Magistrate acquitted the accused on a charge of theft, but convicted them on charges of unlawful assembly, rioting and hurt, and on appeal by the accused against such conviction the Deputy Magistrate found that on the facts the accused must be held to have committed the offence of dacoity (by theft) and committed them to the Sessions :—

Held (1) that the Deputy Magistrate had no jurisdiction to set aside an acquittal in an appeal by the accused against their conviction upon other charges ;

(2) that without reversing the acquittal on the charge of theft, a necessary ingredient in the offence of dacoity would be wanting; and

(3) that the order of the Deputy Magistrate in committing the accused to the Sessions was wrong.

Petition, under Ss. 435 and 439 of the C. P. C., praying the High Court to revise the judgment of the 1st Class Magistrate of Patukotai Division in Criminal Appeal No. 67 of 1902 presented against the findings and sentences of the Stationary 2nd Class Magistrate of Patukotai in C. C. No. 322 of 1902.

T. Rangachariar for *P. S. Sivaswami Aiyar* for petitioner.

The Public Prosecutor (E. B. Powell) for the Crown.

The Court made the following

ORDER:—In this case the accused were charged with being members of an unlawful assembly, rioting, hurt and theft. The 2nd Class Magistrate acquitted them on the charge of theft on the ground that they have acted without dishonest intention. He convicted them on the other charges.

* C. R. C. No. 484 of 1902 and C. R. P. No. 309 of 1902. 10th December 1902.

Sami Aiya
v.
King
Emperor.

The accused appealed. On appeal the Deputy Magistrate was of opinion that on the facts as found by the 2nd Class Magistrate, the offence of theft must be held to have been committed and that the offence committed by the accused amounted to dacoity, and he committed them to Sessions.

One of the facts as found by the 2nd Class Magistrate was that the accused had acted without dishonest intention. The finding of the Deputy Magistrate, in the face of this, that the accused must be held to have committed theft, cannot possibly be supported. The Public Prosecutor, in fact, did not attempt to support it.

A further point taken on behalf of the accused was that it was not competent for the Deputy Magistrate to reverse the acquittal on the charge of theft. Now without reversing the acquittal on the charge of theft, a necessary ingredient of the offence of dacoity would have been wanting and a committal to Sessions on a charge of dacoity would have been clearly wrong.

I am of opinion that under S. 423, C. C. P., the Deputy Magistrate had no power to reverse the acquittal on the charge of theft. It seems to me the words 'reverse the finding and sentence' in clause 1 (f) mean reverse the finding upon which the conviction was based, and do not empower the Appellate Tribunal (at any rate an Appellate Tribunal other than the High Court) to reverse or set aside an acquittal. The case *Queen Empress v. Jahanulla*¹, to which my attention has been called by the Public Prosecutor, is distinguishable on the ground that the Appellate Tribunal in that case (the High Court) was a tribunal which has jurisdiction to set aside an acquittal.

The order of the Deputy Magistrate must be set aside.

The Public Prosecutor has urged that the sentences are inadequate and has asked that, as a court of revision, I should enhance the sentence. The sentences are no doubt light, but I do not think they are so clearly inadequate as to call for the interference of this court.

1. I. L. R., 28, C. 975.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Patumma and others	...	...	Appellants* (<i>Legal representatives of the deceased 1st Petitioner.</i>)
		v.	
Idivi Beari	...	...	Respondent (<i>Counter-petitioner.</i>)

Civil Procedure Code, S. 273—Limitation Act, Sch. II, Art. 179, Cl. (2)—Attachmant of decree—Effect of—Decree-holder's right to apply for execution—Application in accordance with law. Patumma v. Idivi Beari.

S. 273 of the Civil Procedure Code does not render the decree attached under it permanently incapable of execution or does not destroy the decree-holder's interest in the decree attached. It merely operates as a stay of execution unless and until the events mentioned therein take place and delays the realisation of the decree by the decree-holder.

An application for execution of a decree made by the decree-holder when his decree has been attached and while the attachment is yet subsisting is one in accordance with law and keeps the decree alive and a subsequent application made within 3 years of the such last mentioned application is not barred by Art. 179, Cl. (2), Limitation Act.

Appeal from the order of the District Court of South Canara in A. S. No. 347 of 1900, presented against the order of the Court of the Subordinate Judge of South Canara in Regular Execution Petition No. 96 of 1900.

K. Narayana Row for appellant.

K. Ramachandra Aiyar for respondent.

The Court delivered the following

JUDGMENT :—We think that the view taken by the learned District Judge is erroneous. The application made by Pathumma to execute her decree was made to the proper Court and was made in accordance with law. The fact that the Court could not, by reason of the attachment of the decree, immediately execute it on Pathumma's application, does not render her application one not in accordance with law. All that S. 273 of the Civil Procedure Code requires is, that the Court receiving notice of attachment "shall stay execution" unless and until certain events take place, that is, it

Patumma prevents the Court from proceeding with the execution until such
v. events take place, but it does not render the decree permanently
Idivi Beari. incapable of execution by the decree-holder, or destroy the decree-holder's interest in it. It merely delays the realisation of his interest in it. To hold otherwise would manifestly open a wide door to fraud by collusion between the judgment-debtor and persons attaching the decree with the object of preventing the decree-holder from realising his decree for more than three years and thus causing its execution to be barred by limitation.

Pathumma's application was, therefore, sufficient to keep the decree alive, and the present application, though made not by her, but by her attaching creditor, was made within three years of her application, and is therefore not barred by Art. 179, Schedule 2 of the Limitation Act. We set aside the order of the District Judge and restore the order of the Subordinate Judge with costs in this and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Sabapathy Patter and another ... Appellants*
 (Petitioners).

v.

Murukhan and others ... Respondents
 (Counter-petitioners.).

Sabapathy Patter *Redemption decree—Lapse of time limited—Extension of time—Discretion.*
v.

Murukhan.

Plaintiffs who have not applied for redemption in the proper time on the view now held to be erroneous in the Full Bench case of *Vedapuratti v. Vallabha Falia Raja*¹ that a second suit for redemption was maintainable, may apply for an extension of time, and it will be in the proper exercise of the Court's discretion to grant such extension.

Appeal from the order of the Subordinate Judge's Court of South Malabar at Palghat, dated the 26th July 1902 on M. P. No. 428 of 1902.

C. V. Anantakrishna Aiyar for appellants.

J. L. Rosario for respondents.

* A. A. O. No. 114 of 1902.

20th January 1903.

1. I. L. R., 25 M. 300.

The Court delivered the following

Sabapathy
Patter
v.
Murukhan.

JUDGMENT:—Having regard to the fact that under the decision of the Courts prior to the recent Full Bench decision reported in *Vedapuratti v. Vallabha Valia Raja*¹, a redemption decree was not regarded as a bar to a second suit for redemption, and that the petitioners were thereby misled as to the necessity for redeeming strictly within the time limited by the decree on pain of altogether losing the right to redeem. We think the Subordinate Judge might properly in the exercise of his discretion have extended the time for redemption granted by him in the appeal against the decree. We accordingly extend the time to three months from this date, but we direct the appellants to pay the respondent's costs in this appeal and in the lower Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Srinivasa Ramanujachariar ... Appellant* (*Defendant*).

v.

Subbachariar by his next friend

Srinivasachariar and another... Respondents (*Plaintiffs*).

Limitation Act, Arts. 120 and 131—Right to receive Tasdik—Declaration, suit for—Limitation—Adjudication, effect of.

Srinivasa
Ramanuja-
chariar
v.
Subba-
chariar.

A suit for a declaration that the plaintiff as Dharmakarta of a certain religious institution is entitled to receive direct from Government a certain Tasdik amount payable annually is governed by Art. 120 and not by Art. 131.

Where the right to sue for such declaration accrued to the plaintiff more than 6 years before suit he will be only entitled to a declaratory decree for that portion of the amount which appertains to the six years prior to suit.

The adjudication of plaintiff's right will, however, be sufficient for the Government to act upon even in regard to the other years.

Second Appeal from the decree of the District Court of South Arcot in A. S. No. 167 of 1900, presented against the decree of the Court of the District Munsif of Tirukoilur in O. S. No. 303 of 1899.

* S. A. Nos. 1152 of 1901.

21st January 1903.

1. I. L. R., 25 M. 300.

Srinivasa
Ramanuja-
chariar
v.
Subba-
chariar.

A. Nilakanta Aiyar for *V. Krishnaswami Aiyar* for appellant.

T. V. Seshagiri Aiyar for *C. Ramachendra Rao Sahib* for respondents.

The Court delivered the following

JUDGMENT:—The plaintiff's right has been established in both the courts below, and that right has not been successfully impugned in this Court.

The plea strongly relied on by the appellant is that the declaratory relief as to the Tasdik amount is barred by Article 120 of the Limitation Act, and that Article 131, relied on by the District Judge, is inapplicable to the case. We accept the contention that Article 120 is applicable, and that the prayer for a general declaration of the plaintiffs' right to receive annually the Tasdik amount direct from Government is therefore barred inasmuch as the right to sue for such declaration accrued long before six years prior to the suit. But though the remedy for such relief is barred, the right to receive the Tasdik as it accrues from year to year is not extinguished, and inasmuch as the plaint also prays for a declaration of the plaintiff's title to the amount of Rs. 554 in deposit with the Collector on account of arrears for eight years, the plaintiffs are entitled to a declaratory decree for that portion of the amount which appertains to the six years prior to the suit, viz., Rs. 415-8-0, the cause of action in respect of which accrued within six years.

The decree will, therefore, be modified by striking out the general declaration and substituting Rs. 415-8-0 for Rs. 554-0-0.

Though the decree has to be thus modified for technical reasons founded on the law of limitation, the adjudication of the plaintiff's right which has been made will, of course, be sufficient for Government to act upon even in regard to the relief asked for by the plaintiffs but not granted by this decree.

As the appeal substantially fails, the appellant must pay the respondents costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Kattai Mahammad Meera Mohiden and
another Appellants* (2nd
and 3rd Plaintiffs).
v.

The Secretary of State for India in
Council represented by the Collector of
Tinnevelly and another Respondents
(Defendant and 1st
Plaintiff).

Ryotwari land—Ryots applying for land being classified as Poramboke—Exemption from assessment and classification—Extinguishment of title—Right of original ryots to retain possession—Levy of penal assessment—Suit for recovery—Limitation Act, Arts. 14 and 16—Coercion.

Mahammad
Meera
Mohiden
v.

The Secretary
of State
for India.

Where at the request of the ryots certain land occupied by them was exempted from assessment and classified as *gramanattam*, the ownership or title of the ryots is extinguished and it is not open to them notwithstanding such classification to retain the land.

Where land is classified as *poramboke nattam* and is annexed to the village site, the land is at the disposal of Government, and the latter may grant it to *bona fide* applicants for house sites.

Where penal assessment was levied by the Government against persons in occupation of village *poramboke*, without the consent of Government, a suit for the recovery of the sums so paid will be barred after one year from the date when the assessment is levied either under Art. 14 or Art. 16 of the Limitation Act.

Such payments in order that they may be legally recoverable by suit must have been made under coercion.

Second Appeal from the decree of the Subordinate Judge's Court of Tinnevelly in A. S. No. 281 of 1899 presented against the Decree of the Court of the District Munsif of Tinnevelly in O. S. No. 220 of 1897.

K. Ramachandra Aiyar for appellant.

The Government Pleader for respondents.

The Court delivered the following

JUDGMENT:—The appellants and others were the joint owners of certain assessed dry lands and held a joint puttah for

Mahammad
Meera
Mohiden
v.
The Secretary
of State
for India.

them. At the settlement of the district in 1873-74, they appear to have requested the Collector to remit the assessment in order that the land should be used as a *gramanattam*, that is, village house sites. The actual application order are not produced by either side, but the Settlement Register is filed and it shows that the lands now in question were entered therein as *gramanattam* poramboke, and unassessed and were removed from the puttah.

The Settlement Register is a document which is published and which is within the knowledge of all the villagers, and it is not denied that the plaintiffs must have had knowledge of how the land had been classified and registered. The plaintiff took no exception to what was done. In 1894 the revenue authorities found that the plaintiffs were in occupation of the land without permission and imposed a penal assessment in order to force them to quit the land. The plaintiffs contend that notwithstanding what was done at the settlement their title as owners was not affected. It is impossible to uphold this contention. The legal effect of the arrangement made at the settlement was that the plaintiffs relinquished their right and interest in the land in consideration of the Government reclassifying it as Poramboke Nattam and annexing it to the village site, thus placing it at the disposal of Government with a view to its being granted by Government to *bonafide* applicants for house-sites. The fact that the plaintiffs used part of the land for certain purposes or were in occupation without payment of assessment for less than the statutory period, even if true, cannot affect the character of the arrangement made at the time of the settlement or revive the rights which were then given up.

The lower Courts were, therefore, right in holding that the plaintiffs have no title to the land or to retain possession of it. This disposes of their claim to the land. But they also claim refund of certain sums which were levied as prohibitory assessment for their occupation of the land in Fusli 1303, which ended with 30th June 1894. The present suit was instituted in May 1897 admittedly more than one year after the levy of the prohibitory assessment. This part of the suit is therefore barred by either by Article 14 or Article 16 of Schedule 2 of the Limitation Act, and it seems to us unnecessary to decide which of these articles is the

more appropriate. We may also add that it is not alleged in the plaint or shown that the payment was made under coercion so as to be legally recoverable by suit. See *Muthayya Ohetti v. Secretary of State for India*¹). On both these grounds, the claim for refund must be held to have been rightly dismissed, and it is not necessary for us to decide the more difficult and important question of the legality of the action of the Revenue Officers in imposing the so-called prohibitory assessment on lands which are at the disposal of Government and which are unlawfully occupied by a trespasser, whom the Government wish to eject by the imposition of such assessment.

Mahammad
Meera
Mohideen
v.
The Secretary
of State for
India.

The second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Ari Chetty, *In re*, auction purchaser in O. S. No. 855 of 1897.*

Auction-Purchaser—Balance purchase-money—Court closed for vacation—Fifteen days expiring during recess—Payment on re-opening day—Receipt of papers and granting of copies.

Ari Chetty,
In re.

Where the Court is closed for the vacation and provision is made only for the receipt of certain papers and the grant of copies of documents on certain days during the vacation, a purchaser at an auction-sale held prior to the vacation who has paid the 25 per cent. deposit will be justified in paying the balance of the purchase-money on the first day after the vacation where the 15 days allowed to him expires during the recess.

Case stated under S. 617, Act XIV of 1882, by the District Munsif of Tirupatur in his letter, dated 15th July 1902, No. 217, referring for orders of the High Court, the question whether the payment of the balance of the purchase money on the re-opening of the day of the court after the 15 days is valid.

T. R. Venkatarama Sastriar for P. S. Sivaswami Aiyar,
for the purchasers.

* Referred Case No. 12 of 1903.

26th January 1903.

1. I. L. R., 22 M. 100.

Ari Chetty,
In re.

The Court delivered the following

JUDGMENT:—The notification which authorized the adjournment of the Court for the vacation makes provision only for the receipt of certain papers and the grant of copies of documents on certain days during the vacation.

The Court must be regarded as closed for other purposes. The payments therefore made on the first day after the vacation must be regarded as made in time.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Muhammad Bavu Sahib ... Petitioner* in C. M.
P. No. 987 (1st
Counter-Petitioner).

v.

The District Judge of Madura ... Respondent.

Muhammad Bavu Sahib *Legal Practitioners Act, S. 36—Application to declare as touts—Affidavits—Civil Procedure Code, Ss. 194, 195 and 647—Sessions or District Judge—Subordinate Courts—District and other Magistrates not subordinate—Criminal Procedure Code, S. 17 (1) and (5).*
v.
The District Judge of Madura.

It is competent to a District Judge to act upon affidavits in an application under the Legal Practitioners Act to declare certain persons as touts. This procedure is warranted by Ss. 194, 195 and 647, C. P. C.

Under S. 36 of the Legal Practitioners Act, the District or Sessions Judge has jurisdiction to prohibit persons declared as touts to appear within the precincts of his own Court and of the Courts subordinate to him.

The District Magistrate and other Magistrates in the District are not subordinate to the Sessions Judge under S. 17 (1) and (5) of the Criminal Procedure Code.

Application praying that, in the circumstances stated therein, the High Court will be pleased to set aside the order of the

* C. P. No. 987 of 1902.

29th January 1903.

District Court of Madura in its proceedings, dated 2nd May 1902, No. 3558, declaring the petitioners to be law touts under S. 36 of the Legal Practitioners Act.

Muhammed
Bavu Sahib
v.
The District
Judge of
Madura.

C. Krishnan, Counsel for the petitioner.

The Court made the following

ORDER :—Notice was issued to the District Judge, but the Government Pleader does not appear. Objection is taken by the petitioners to the action of the District Judge on the ground that he acted on affidavits. We think that it was open to the District Judge, under Ss. 194, 195 and 647, Civil Procedure Code, to act upon affidavits filed in support of the application made by the Vakils to have the petitioners declared to be law touts ; though in a matter of this kind we think it would have been more regular and satisfactory to have examined the deponents in Court as witnesses. We observe, however, that no objection was taken before the District Judge on this score, nor did the petitioner even apply as they might have done, to have the deponents examined or cross-examined in Court. We must, therefore, disallow this objection. We, however, observe that the District Judge acted in excess of his jurisdiction in extending the operation of his order to the Criminal Courts in the District other than his own Sessions Court. S. 36 of the Legal Practitioners Act, only gives him jurisdiction in his own Court and in Courts subordinate to him.

Under S. 17 (1) and (5) of the Criminal Procedure Code, neither the District Magistrate nor the other Magistrates are subordinate to the Sessions Judge except so far as is expressly provided by the Criminal Procedure Code.

We must, therefore, under S. 622, Civil Procedure Code, cancel so much of the order as relates to the Courts of the District and other Magistrates.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*
and Mr. Justice Subramania Aiyar.

Vasudevan Nambudri, and another .. Appellants* (*Plaintiff*
and his representa-
tive.)

v.

Krishna Pisharoti, Karnavan and
Manager of the Tarwad and
others Respondents (*Defend-*
ants.)

Vasudevan Nambudri v. Krishna Pisharoti. *Redemption suit—Suit upon one mortgage and title—Specific mortgage not proved—Mortgage of another date found—Redemption.*

Where a plaintiff fails to prove the specific mortgage set up by him, no decree could be passed in his favour on the basis of any other mortgage, which the Court might find to have been proved in the suit.

Second Appeal from the decree of the Subordinate Judge's Court of South Malabar at Calicut in A. S. No. 965 of 1899, presented against the decree of the Court of the District Munsif of Angadipuram, in O. S. No. 565 of 1898.

Suit to redeem a mortgage of 1833. The defendants denied the plaintiff's right, and contended that they were the owners of the suit properties. The Court of First Instance found that the mortgage of 1833 was not proved, but gave the plaintiff a decree on the ground that a mortgage for the same amount by the plaintiff to the defendants of the year 1816 had been proved in the course of the suit and that it had been acknowledged by the defendants in 1852. The suit was based also on plaintiff's title. The lower appellate court agreed with the findings of the first court, but dismissed the suit on the ground that the plaintiff had not proved the specific mortgage alleged by the plaintiff in his plaint. Plaintiff preferred this second appeal.

P. K. Nambyar for appellant.

C. V. Anantakrishna Aiyar for respondents.

* S. A. No. 1215 of 1900.

12th February 1908.

The Court delivered the following

Vasudevan
Nambudri
v.
Krishna
Pisharati.

JUDGMENT:—Even assuming that Exhibit I operates as an acknowledgment within the meaning of S. 19 of the Limitation Act, (as to which we express no opinion), we see no reason to doubt the soundness of the principle upon which the judgment in the case reported in *Krishna Pillai v. Rangasami Pillai*¹ proceeded. Following that case we hold that this second appeal must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*.

Sundara Mudali ... Petitioner* (*Plaintiff*).

v.

Ponnusami Mudali ... Respondent (*Defendant*).

Civil Procedure Code, Ss. 520, 521 and 525—Application to file award—Misconduct of arbitrator—Jurisdiction to set aside award—Refusal to file—One side not heard.

Sundara
Mudali
v.
Ponnusami
Mudali.

Where a dispute is referred to arbitration without the intervention of Court and after the award is made an application is made under S. 525 by one of the parties to file the award in Court, the judge if he finds grounds mentioned in S. 520 or 521, C. P. C., can only refuse to file the award and has no jurisdiction to set it aside.

*Muhammad Nawashkan v. Alamkhan*² followed; and *Chintamalayya v. Thadi Gangireddi*³ distinguished.

If the arbitrators had heard only one side and declined to hear the other, that would be misconduct within the meaning of S. 521, C. P. C.

A judge cannot constitute himself a court of appeal from the decision of the arbitrators.

Petition under S. 622 of the Civil Procedure Code, praying the High Court to revise the decree of the Court of the District Munsif of Vellore in O. S. No. 359 of 1900.

The petitioner presented a petition to the District Munsif under S. 525, C. P. C., for filing an award. The Munsif found that the arbitrators were guilty of misconduct inasmuch as the arbitrators did not call for any explanation from the respondent

* C. R. P. No. 267 of 1902.

2nd February 1908.

1. I. L. R., 18 M. 462. 2. L. R., 18 I. A. 73. 3. I. L. R., 20 M. 89.

Sundara
Mudali
v.
Ponnusami
Mudali.

of certain vouchers and statements filed by the petitioner, and that the decision of the arbitrators was unsound. He, therefore, set aside the award.

V. Krishnaswami Aiyar for petitioner.

R. Sivarama Aiyar for respondent.

The Court delivered the following .

JUDGMENT:—This is a revision petition against an order of the District Munsif of Vellore setting aside an award. The dispute between the parties was referred to arbitration without the intervention of the Court under S. 525 of the Code. Consequently Ss. 525 and 526 are the governing sections. S. 526 provides if no ground such as is mentioned or referred to in S. 520 or S. 521 be shown against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter." The Munsif in making the order setting aside the award purported to act under S. 526. It seems to me that, in making an order under this section, it was only competent for him, either, if he was satisfied that no ground such as is mentioned in S. 520 or S. 521 was shown, to order the award to be filed or, if he was satisfied that such ground was shown, to dismiss the application to file the award. In my opinion it was not competent for him in these proceedings to make an order setting aside the award, and I must hold that the order setting aside the award was made without jurisdiction. It is clear that the legal consequences which ensue from an order refusing to file an award may differ very materially from the legal consequences which ensue from an order setting aside the award. This is clearly pointed out in the judgment of the Privy Council in the case of *Muhammad Nawas Khan v. Alam Khan*¹. My attention has been called on behalf of the defendant, (the party who obtained the order setting aside the award) to the case of *Chintamalayya v. Thadi Gangireddi*². There an application was made by one of the parties who had submitted to arbitration to have an award which had been made filed in Court. Certain objections were raised and those objections were overruled and a decree was passed in the terms of the award. Afterwards the party who had objected to the filing

1. *L. R.*, 18 *L. A.* 78.

2. *L. R.*, 20 *M.* 89.

Sundara
Mudali
v.
Ponnusami
Mudali.

of the award brought a suit to have it declared that neither the award nor the decree passed in pursuance of that award was binding on him, and the Court held that inasmuch as the Court had jurisdiction to determine the genuineness or validity of the award in the proceedings under the chapter in question, the suit was not maintainable. It may very well be that where objections are raised to an award and those objections are gone into by the Court and overruled and a decree passed in terms of the award, in a subsequent action the decree so passed may be held to be binding, but it does not at all, it seems to me, follow that where an application is made to file an award and the Court is of opinion that a good case has not been made out, it is competent for the Court on the application to file the award to make a formal order setting it aside. I do not think the present case is governed by this decision, and I am of opinion that the order setting aside the award was made without jurisdiction. In making the order setting aside the award, the Munsif acted on the ground that the arbitrators had been guilty of misconduct. I need scarcely say if it was shown that the arbitrators heard only one side and declined to hear the other side, they would have been guilty of misconduct, and the award could be impeached upon that ground, but I have read the order of the Munsif and the statement of facts therein contained and I am of opinion that there is nothing to lend any support to the suggestion that the arbitrators were guilty of misconduct in the sense in which that word is used in S. 521 and in the sense in which that word has been construed in the decisions with reference to questions of this nature. It might perhaps be said that the proceedings of the arbitrators in the present case were informal, but I do not think it can be put higher than that. The mistake the munsif appears to have made in this case is that he seems to have regarded himself as a court of appeal from the decision of the arbitrators to whom the parties of their own free will referred their disputes for arbitration. The result is, I must set aside the order of the Munsif, and, as it seems to be a clear case, I send back the case to the Munsif with the direction that he do file the award.

The plaintiff is entitled to the costs of the application before the Munsif and also to his costs in this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Chief Justice*,
Mr. Justice Subramania Aiyar and Mr. Justice Davies.

Krishnasawmy Mudaliar ... Appellant.*

v.

The Official Assignee to the estate of

S. Raghavalu Naidu ... Respondent.

Krishnasawmy Mudaliar v. The Official Assignee. *Civil Procedure Code, Ss. 268, 270, 295 and 490—Attachment of a debt before judgment—Decree in plaintiff's favour—Judgment-debtor filing insolvency schedule—Title of Official Assignee to debt—Rights of attaching creditor—Effect of attachment—Act VIII of 1859 S. 270.*

S. 490, C. P. C., provides that where an attachment before judgment is made and a decree is passed in plaintiff's favour it is not necessary to re-attach the property in execution of the decree.

An order of attachment does not operate so as to give the attaching creditor priority over the other creditors in the insolvency.

An order of attachment of a debt under S. 268 merely restrains the debtor's creditor from paying to the debtor and restrains the debtor from receiving the same. Attachment prevents alienation but does not confer title.

An attachment of a debt becomes complete so as to prevent the title of the trustee in bankruptcy or the Official Assignee only on receipt of the debt.

Even where an attachment of property is made and an order for sale is obtained by the creditor the latter obtains no title to the property attached so as to prevent the same from vesting in the Official Assignee.

*Sakries v. Mussumat Bandho Bae*¹, and *Frederick Peacock v. Madan Gopal*², followed.

Under S. 270 of Act VIII of 1859 an attaching creditor was entitled to priority as against subsequent creditors. The present Code of Civil Procedure (Act XIV of 1882) S. 295, has altered the law.

Where, therefore, the plaintiff obtained before judgment an attachment of a debt due to his debtor by Messrs. Parry and Co., and subsequently obtained a decree and after such decree, the debtor filed his schedule and a vesting order was made in favour of the Official Assignee.

Held, that the Official Assignee was entitled as against the attaching creditor to receive the debt due to the insolvent from Messrs. Parry and Co.

Appeal from the order of Mr. Justice Boddam in claim in C. S. No. 18 of 1900, dated the 11th March 1902 in the ordinary original civil jurisdiction of this Court.

* O. S. A. 20 of 1902.

1. I. N. W. P. 181.

5th February 1903.

2. I. L. R., 29 C. 438,

C. V. Anantakrishna Aiyar for appellant.

A. Daly for respondent.

Krishna-
swami
Mudaliar
v.
The Official
Assignee.

The Court delivered the following

JUDGMENT :—This is an appeal from an order of *Boddam, J.*, allowing the claim of the Official Assignee of the estate of one *Raghavalu Naidu*, an insolvent, as against an attaching creditor of the insolvent. The material dates are these:—On February 6th, 1900, the creditor obtained an order under S. 483 of the Code of Civil Procedure attaching before judgment, a sum of Rs. 40,000 which had been deposited with Messrs. Parry & Co. by the insolvent as security for the performance of his duties as a dubash, and a further order under S. 268 of the Code of Civil Procedure restraining the insolvent from receiving this sum of Rs. 40,000 from Messrs. Parry & Co., and restraining Messrs. Parry & Co. from paying it to the insolvent. On July 25th, 1900, the creditor obtained a decree against the insolvent for Rs. 12,000 odd. On February 18th, 1901, an order of adjudication in insolvency was made on the petition of the insolvent, and an order was subsequently made under S. 7 of the Insolvency Act, vesting his estate in the Official Assignee. S. 490 of the Code of C. P. C. provides that where property is attached before judgment, and a decree is given in favour of the plaintiff, it is not necessary to re-attach the property in execution of the decree. The case therefore stands upon the same footing as if the creditor had obtained his decree and had afterwards obtained an order of attachment before the adjudication. The question for determination is—does the order of attachment operate so as to give the attaching creditor priority over the other creditors in the insolvency? In one sense, no doubt, the process of attachment is complete—that is, the creditor has done all that the Code requires him to do to give him the rights of an attaching creditor. In the sense in which, for the purposes of the present English Bankruptcy Law, an attachment is deemed to be complete so as to give the attaching creditor a good title as against a trustee in bankruptcy, the attachment is not complete. Under S. 45 of the Bankruptcy Act, 1883, the attachment of a debt is only completed by the receipt of the debt. On behalf of the attaching creditor, reliance

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was placed upon the decision of the Court of Appeal in *Ex parte Joselyne, In re Watt*¹, where it was held that a judgment-creditor had obtained a garnishee order *nisi* attaching debts due to the judgment-debtor before the filing of a liquidation petition was a secured creditor within S. 16 (3) of the Act of 1869, and his title to the attached debts prevailed over that of the trustee. The law as laid down in the case referred to was altered by the Act of 1883, and it may be observed that the English Act of 1849 and most of the bankruptcy statutes prior to that of 1869 contained a provision which deprived execution creditors of the benefit of their execution if they had not realized by seizure and sale before the adjudication. See Williams on Bankruptcy, Edition 6, page 45. The English decisions, however, are only useful by way of analogy. The question really has to be decided with reference to the provisions of the Code of Civil Procedure and of the Insolvency Act which is in force in this country (11 and 12 Vict. Ch. 21). First, it is to who observed that there is nothing in any of the provisions of the Code, which, in terms, makes the attaching creditor a secured creditor, or any charge or lien in his favour over the property attached. The order of attachment merely restrains the debtor's creditor from paying to the debtor, the money attached, and restrains the debtor from receiving the same. See form 139 of Schedule IV of the Code of Civil Procedure.

The order does not purport to deal with any question of title as between the debtor and the party in whose hands the debt alleged to be due to the debtor is attached, or as between the debtor and any party in whom his estate may afterwards become vested by operation of law. In other words, attachment prevents alienation; it does not confer title. See the Judgment of the Privy Council in the case of *Moti Lal v. Karrab-ul-din*². *Prima facie* on the making of a vesting order under S. 7 of the Insolvency Act the right to recover a debt due to the debtor vests in the Official Assignee as part of the insolvent estate. It is for the attaching creditor to show that, under the provisions of the Code of Civil Procedure, the order of attachment operates so as to prevent this right from vesting. In our judgment the making of an order of attachment in

1. 8 Ch. D. 327. 2. I. L. R., 25 C. 179; Sc. L. R., 24 I. A. 170.

favour of a judgment-creditor obtained under S. 268 of the Code of Civil Procedure only operates so as to give the judgment-creditor certain rights in execution. It does not operate, when these rights are not exercised before the presentation of a petition in insolvency, so as to create in favour of the judgment-creditor a title which prevails against that of the Official Assignee under a vesting order in insolvency made after the order of attachment. As regards the authorities the precise point does not appear to have been decided by this Court. In the case *Sadayappa v. Ponnamma*¹, where the vesting order was after attachment, but before decree, it was held that the title of the Official Assignee prevailed. In that case the Judges observe that there is a material difference between an order of attachment under the Code of Civil Procedure and a writ of *fi-fa* in that the latter is an order for sale while the former is a step which may or may not be accompanied by an order for sale. On principle it seems difficult to draw any distinction between the case of *Sadayappa v. Ponnamma*¹ and the present case, since it cannot be contended that the decree in the present case, *quasi* decree, constituted the judgment-creditor a secured creditor or gave him any charge or lien over the property of the judgment-debtor. In the case *Veeraraghava v. Parasurama*² a judgment-creditor had obtained an order for the sale of the attached property before the vesting order was made, and the question involved was the right of another judgment-creditor to rateable distribution of the proceeds of the sale to be held in execution of the attachment already made. It was held that rateable distribution could be ordered upon the ground that the Official Assignee having applied to the District Court to stay the sale and not having appealed against an order dismissing his application, there was no further question between the Official Assignee and the judgment-creditors, and the pendency of the proceedings in insolvency was no reason for refusing rateable distribution as between the judgment-creditors. The case turned upon the rights of the judgment-creditors *inter se* and not upon the rights of a judgment-creditor who had obtained an order of attachment as against the Official Assignee. The case is also distinguishable from the present case

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1 I. L. R., 8 M. 554.

2. I. L. R., 15 M. 372.

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on the ground that the attaching creditor had obtained an order for sale before the adjudication in insolvency.

The point was considered in an elaborate judgment of the Allahabad High Court, in which it was held that the Official Assignee was entitled under a vesting order to possession of an insolvent's estate, even when the estate had been attached in execution of a decree and an order for sale had been made, *Sarkies, Agent of the Official Assignee of the Insolvent Court of Calcutta, v. Mussumat Bandho Bae*¹. In the case *Anand Chandra Pal v. Panchilal Sarma*², a Full Bench of the Calcutta High Court held that when a creditor had obtained a decree and an order of attachment before the vesting order was made, the vesting order passed the property to the Official Assignee subject to being divested by a sale of the attached property in execution of the decree. In three subsequent cases, *Shib Kristo Shaha Chowdhry v. Miller*³, *Soobul Chunder Sen v. Russick Lal Mitter*⁴ and *Frederick Peacock v. Madan Gopal*⁵ and others, the Calcutta High Court have declined to follow this decision. In the case *Shib Kristo Shaha Chowdhry v. Miller*³, the point was only decided by a majority of 3 to 2, but in the cases of *Soobul Chunder Sen v. Russick Lal Mitter*⁴ and *Frederick Peacock v. Madan Gopal*⁵, the Court was unanimous. The case in *Miller v. Lukhimani Deb*⁶, has now been overruled by the decision of the Full Bench in *Frederick Peacock v. Madan Gopal*⁵. As pointed out by the Chief Justice in his judgment in the latter case, there is a marked distinction between the language of S. 270 of the Act of 1859, the enactment in force when the case of *Ananda Chandra Pal*² was decided, and S. 295 of the present Code of Civil Procedure. Under S. 270 of the Code of 1859 a creditor obtaining an attachment was entitled to be first paid out of the proceeds of the sale notwithstanding a subsequent attachment. S. 295 of the present Code provides for rateable distribution amongst creditors when more persons than one have, prior to realization in execution of a decree applied for execution of decrees against the same judgment-debtor.

1. I. N. W. P. 81.

2. 5 B. L. R. 691.

3. I. L. R., 10 C. 150.

4. I. L. R., 15 C. 202.

5. I. L. R., 29 C. 428.

6. I. L. R., 28 C. 419.

The amendments of the law of procedure in this country, as well as of the law of bankruptcy in England, have been based upon the principle that so far as possible the creditors should be treated *pari passu* and that nothing short of actual realization of the debt due should give rights of priority.

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If under the provisions of the present Code an attaching creditor does not obtain a charge or lien on the attached property, no question, as it seems to us, of the property vesting subject to any equity in favour of the attaching creditor really arises.

We think the decision of *Boddam, J.*, was right and we dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Somasundara Mudaly by his guardian

Salakshi Anne Appellant*
(1st Defendant).

v.

Duraisami Mudaliar Respondent
(Plaintiff).

Registration Act, Ss. 17 and 49—Authority to adopt—Writing—No will—Direction that adopted son should take possession—Registration—Oral evidence—Evidence Act, S. 91.

Somasundara
Mudaly
v.
Duraisami
Mudaliar.

A will is a testamentary disposition of property.

A document containing an authority to adopt is not a will, and the mere fact that there is a direction in the document that the adopted son should be put in possession of the property does not constitute such direction a devise of property.

An authority to adopt which is in writing and not contained in a will must be compulsorily registered under Ss. 17 and 49 of the Registration Act.

Quære :—Whether oral evidence is admissible when an authority to adopt compulsorily registrable is not registered.

* Appeal No. 83 of 1901.

13th February 1903.

Somasundara
Mudaly
v.
Duraismi
Mudaliar.

Whether in S. 91 of the Evidence Act the word 'grant' is confined only to 'grant of property.'

Appeal from the decree of the Subordinate Judge's Court of Kumbakonam, in O. S. No. 50 of 1899.

B. Panchapagesa Sastri for *V. Sankaranarayana Sastri* for appellant.

T. Rama Row for respondent.

The Court delivered the following

JUDGMENT:—The appellant (1st defendant) alleges that the adoption was made under an authority to adopt given in the so-called will, Exhibit I. This document is in no sense a will, *i. e.*, a testamentary disposition of property (*Vide* S. 3, Act V of 1881). It is an authority to adopt and nothing else: and the direction therein given to put the adopted son into possession of the property cannot be construed as a devise of the property. It is simply a statement of the consequences that should legally follow on the adoption. *Mussumat Bhoobun Moyee Debia v. Ram Kishore Acharjee Chowdhry*¹.

The authority to adopt being in writing and not contained in a will, its registration is compulsory, and, unless registered, it is inoperative to confer such authority (Ss. 17 and 49, Indian Registration Act III of 1877). We may add that there is no evidence except Exhibit I to prove that authority was given, assuming that such evidence could be adduced—an assumption that is doubtful, the question depending on whether the word "grant" in S. 91 of the Indian Evidence Act means a grant of property only or refers to other grants also. There being therefore no evidence that any authority to adopt was given, the adoption, if it took place, was invalid.

We therefore dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Bhashyam Aiyangar.

Doraswami Pillai *Petitioner.**

v.

The King Emperor *Respondent.*

Indian Penal Code, Ss. 104 and 442—Suspected person—Police constable—Right to enter house—House-trespass—Pushing police out of house—Right of self-defence.

Doraswami
Pillai
v.
The King
Emperor.

A police officer is not justified by the mere fact that a person is of a suspicious character to enter his house at midnight and see whether he is in the house. The act of the police officer in so entering the house is a house-trespass for which the police-officer will be responsible under S. 442 of the Penal Code as the act is calculated to annoy the members of the family of the suspected person and also to insult the latter person.

The suspected person will be justified under S. 104 in inflicting slight harm upon the police-officer, viz., in pushing the police constable out from the house.

Petition under sections 435 and 439 of Criminal Procedure Code praying the High Court to revise the judgment of the 1st Class Deputy Magistrate of Chidambaram in Criminal Appeal No. 63 of 1902 confirming the finding and sentence of the Stationary 2nd Class Magistrate of Chidambaram in C. C. No. 416 of 1902.

T. Rangachariar for petitioner.

The Public Prosecutor (E. B. Powell) for the Crown.

The Court made the following .

ORDER :—It is clear that the conviction of the accused in this case under S. 353, I. P. C., is illegal and cannot be upheld. It is impossible to regard the constable as engaged in the execution of his duty as a public servant when he entered upon the premises of the accused about midnight with another constable and stood knocking at the door of the accused's house to see if he was present. The fact that the accused is a person who is regarded by the Police as a suspicious character (K. D.) and as one whose movements ought to be watched, does not authorise the complainant to enter upon his premises or knock at his door with a view to ascertaining whether he is present in his house or not.

* C. B. C. No. 589 of 1902. (C. B. P. No. 371 of 1902.) 3rd March 1903.

Doraswami
Pillai
v.
The King
Emperor.

The police circular orders referred to by the Magistrate have not the force of law, but in justice to them, I may observe, that there is nothing whatever in any of them which warrants the course adopted by the complainant. It is perfectly lawful for officers of the Police to watch the movements of suspected characters, and they are properly required to do so by Police circular orders. But they can do so only by lawful means and not by trespassing upon his premises or by having recourse to other unlawful means. It is found that the accused came out, abused and pushed, the complainant and afterwards brought a stick from inside and lifted it up as if he was going to beat him with it and that the complainant's turban fell on the ground when he was pushed. Under these circumstances, the accused would no doubt be guilty of assault or of using criminal force, unless his act could be regarded as done in the exercise of the right of private defence of property. The constable in entering upon the accused's dwelling house and knocking at his door at midnight with the intention of finding out whether the accused who is regarded as a suspected character by the Police was in his house or not, was technically guilty of house trespass under S. 442 of the Indian Penal Code. The course adopted by the constable was certainly one which would cause annoyance to the inmates of the house, if not, also insulting to the accused, and under S. 104 the accused was justified in voluntarily causing to the complainant the slight harm which he inflicted on him, and the constable cannot be regarded under S. 99, Indian Penal Code, as acting in good faith (*vide* S. 52, Indian Penal Code), under colour of his office though his act may not be strictly justifiable by law. No police circular order or any other order has been pointed out which though not strictly justifiable in law he can *bona fide* plead in support of the course pursued by him of entering upon the premises of the accused at midnight and knocking at the door. I may also remark that the sentence of three months' rigorous imprisonment which was passed upon the accused is unduly severe under the circumstances of the case, even if he were guilty of any offence. I reverse the conviction and sentence and acquit the accused and direct that he be set at liberty, the bail bond being cancelled.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.*

(ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS).

Annamalai
Chetty
v.
Murugasa
Chetty.

Present at the Hearing :—Lord Macnaghten, Lord Lindley,
Sir Andrew Scoble, Sir Arthur Wilson.

Annamalai Chetty *Appellant.*

v.

Murugasa Chetty and another *Respondent.*

Civil Procedure Code, S. 17—Foreigner defendant—Jurisdiction of British Indian Courts—Carrying on business—Relation of Manager to Members of a Hindu family—Effect of foreign insolvency upon foreign judgment.

Under S. 17 of the Civil Procedure Code, British Indian Courts have jurisdiction to try a suit as against a defendant who is a foreigner when the cause of action arises within the local limits of the jurisdiction of the British Indian Court.

Girdhar Damodhar v. Kassigar,¹ approved.

Quære.—Whether the British Indian Court has jurisdiction as against a foreigner non-resident defendant who carries on business within the local limits through an agent, although the cause of action may have arisen in a foreign country, and not within the local limits of the British Indian Court.

A managing member of a Hindu family is not an agent for the other members so as to make them liable to be sued as if they were the principals of the manager.

The relation between the manager and the other members of a Hindu family is not that of principal and agent or of partners. It is much like that of trustee and *cestui que trust*.

Question whether a suit upon a foreign judgment after the defendant is adjudicated a bankrupt in the foreign state is maintainable not decided.

Quelin v. Moisson,² referred to.

The judgment of their Lordships was delivered by

LORD LINDLEY :—The plaintiff and the defendant in the action which has given rise to this appeal are French subjects living and trading in Pondicherry. The plaintiff sued the defendant Murugesa Chetty in Pondicherry on a promissory note, and on the 20th March 1896, the plaintiff obtained judgment by default for Rs. 13,968 with interest and costs. Execution proceedings were taken in Pondicherry on this judgment, but nothing was recovered. On the 20th July 1896, the defendant's firm was declared insolvent, at the instance of other creditors, by the Pondicherry Court, and

* 25th May 1903.

1. I. L. R., 17 B. 662.

2. 1 Knapp 365.

**Annamalai
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Chetty.**

on the 23rd September, the insolvency was declared to have effect retrospectively from the 8th January 1896, which was anterior to the plaintiff's judgment and indeed to the commencement of the action in which it was obtained. In the insolvency proceedings Syndics were appointed as usual, and the plaintiff applied for payment out of the estate; but it does not appear that he obtained payment of any dividend.

On the 8th October 1896, this action was commenced in the District Court of South Arcot, which is in the Madras Presidency, and near Pondicherry. The action was by the same plaintiff against the same defendant, Murugesa Chetty, and was based on the judgment already obtained against him in Pondicherry. The Receiver appointed by the Court in Pondicherry was also made a defendant to represent the Syndics.

In order to get over any difficulty which might arise as to the jurisdiction of the Arcot Court to entertain the action, the plaintiff described the defendant Murugesa Chetty as residing in British Indian Territory, *i. e.*, Cuddalore and other places, and as having houses of business and carrying on business there. The defendant put in an appearance to this action and a statement and supplemental statement of defence, denying these allegations and denying the jurisdiction of the Court to entertain the action. He also impeached the validity of the promissory note and judgment by default, and, lastly, he relied on the insolvency proceedings as a defence to the action even if the Court had jurisdiction to entertain it.

The Receiver was also allowed to appear and put in a defence, which he did. He denied the jurisdiction of the Court to entertain the action; and he further relied on the insolvency proceedings as invalidating the judgment, and also as furnishing a defence to the action upon it, if still in force, and if the Arcot Court had any jurisdiction to entertain the action.

The following issues were settled:—

- I. Is this Court prevented from entertaining the suit by reason of the cause of action not having arisen and defendant not being resident or carrying on business within its jurisdiction?

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- II. Did or did not the defendant reside or carry on business within the jurisdiction of this Court on the date when cause of action arose?
- III. Was the French judgment on which the suit has been brought according to French Law null and void on the date of suit and is the present claim based on the French judgment, therefore, not sustainable in this Court?
- IV. Is it open to the defendant to raise the contention in this suit that the promissory note on which the French judgment was passed was obtained from the defendant by the plaintiff fraudulently?
- V. And, if so, was the promissory note obtained by the plaintiff from the defendant fraudulently?
- VI. What is the relief, if any, that the plaintiff is entitled to?

The parties were directed to file all the documents they relied on; and French law books might be filed at the hearing.

Considerable evidence was adduced on both sides upon the question of carrying on business in British Indian territory, but there was no evidence worth mentioning that the defendant ever resided in British India; nor was there any evidence that the cause of action arose from any transaction which took place therein. It was proved that the defendant had relatives and a share of property in British India, and that a cousin named Kandasami Chetty managed this property and paid money to the defendant. On the other hand there was no evidence worth mentioning to support the defendant's charges of fraud by which he sought to impeach the promissory note and judgment sued upon, and this part of the case was subsequently abandoned by the defendant's counsel.

The insolvency proceedings in Pondicherry were all put in evidence, but no opinion appears to have been obtained from any expert in French law as to the legal effect of those proceedings either on the judgment recovered by the plaintiff in Pondicherry before they in fact commenced, or on the discharge of the defendant from liability to pay the judgment debt.

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The District Judge states that the only issues really contested before him were the 1st and 2nd ; no argument was put forward on the 3rd, but he looked up the French law as best he could in the Code Napoleon, and he came to the conclusion that the judgment sued upon was not null and void when the action in the Arcot Court was commenced, and he therefore found the third issue for the plaintiff. He decided that it was not competent for him to go behind the French judgment, and thus disposed of the fourth and fifth issues. He found however as a fact that the defendant did carry on business in British India, viz., in Cuddalore, where the action was commenced, and he accordingly gave judgment for the plaintiff with costs.

The defendant appealed from this decision to the High Court at Madras which reversed the judgment and dismissed the action with costs, on the ground, first, that it was not proved that the defendant did in fact carry on business in British India when the action was commenced ; and on the further ground [that the insolvency proceedings were a bar to the action. They came to this conclusion on the authority of a decision of this Board in 1827, viz., *Quelin v. Moisson*.¹

In both Courts in India it was apparently assumed that the question of jurisdiction turned on S. 17 of the Code of Civil Procedure, and that although the defendant was a foreigner, and although the cause of action arose in a foreign country, and although the defendant did not personally reside within the local limits of the jurisdiction of any Court in British India, and was not even temporarily in Arcot when sued there, yet he could be sued in the Arcot Court if he carried on business through an Agent in the local limits of that Court's jurisdiction.

This assumption appears to their Lordships to require more attention than it has received. Their Lordships see no reason for doubting the correctness of the decision of the case of *Girdhar Damodar v. Kassigar Hiragar*² where the defendant was a native of Cutch, and the cause of action arose within the local limits of the jurisdiction of the British Indian Court in which the action was brought. But that case does not cover the present one.

1. 1 Knapp. 265.

2. I. L. R., 17 B. 662.

It is not, however, necessary to pursue this matter, for it is admitted by all parties and it is plain that this appeal must fail unless their Lordships agree with the District Judge in coming to the conclusion that at the time of the commencement of this suit, viz., on the 8th October 1896, the defendant was by his agent carrying on business in Cuddalore or some other place within the jurisdiction of the Court. The burden of proving this is clearly on the plaintiff; he has given evidence himself and called witnesses, and his and their evidence, until carefully examined, seems sufficient to establish such trading, especially as the defendant was within reach and was not called to deny or explain their statements. This omission was naturally made the most of by the appellant's counsel. But it must be remembered that the defendant was a bankrupt and in great difficulties, and was naturally very reluctant to expose himself to a long and hostile cross-examination. After carefully considering the evidence, their Lordships have come to the conclusion that the District Judge fell into the error of treating Kandasami Chetti as the agent of the defendant. This mistake is clearly pointed out by the High Court. Kandasami Chetti's acts and his payments to the defendant are all attributable to his being the manager of joint family property, of which the defendant had a share; and their Lordships entirely concur with the High Court in holding that such a person is not the agent of the members of the family so as to make them liable to be sued as if they were the principals of the manager. The relation of such persons is not that of principal or agent, or of partners; it is much more like that of trustee and *cestui que trust*. Those witnesses who say they saw the defendant trading in Cuddalore do not speak of the critical time. An attempt was made to show that the joint property was divided long ago, and that Kandasami Chetty was not acting as manager of family property in which the defendant had an interest. But this attempt failed, for although some money was divided, the rest of the joint property was not decreed to be partitioned until 1897.

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In short, the moment the error of treating Kandasami Chetty as the defendant's agent is corrected, the rest of the evidence all crumbles away.

This conclusion renders it unnecessary to consider the effect of the defendant's insolvency either on the validity of the judgment

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sued on or on the insolvency affording a defence to the action if the judgment is still in force. *Quelin v. Moisson*¹ goes far to show that the insolvency would afford a defence; but their Lordships might have thought it right not to decide this point in the absence of evidence of persons skilled in French law.

Their Lordships will humbly advise His Majesty to dismiss the appeal, and the appellant must pay the costs of the respondent Murugasa Chetty, the other respondent not having appeared.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH).

Present:—Sir Charles Arnold White, *Chief Justice*,
Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Rathnam Pillai *Petitioner*.*

v.

Pappa Pillai *alias* Sundaram Pillai *Respondent*.

Rathnam Pillai v. Pappa Pillai. *Civil Procedure Code, Ss. 408, 409 and 622—Leave to sue as pauper—Scope of enquiry—Pauperism of applicant—Enquiry into merits—Jurisdiction.*

The investigation contemplated under S. 409, C. P. C., where a day is fixed for hearing under S. 408 in an application for leave to sue in *forma pauperis* must be confined to the question of the applicant's pauperism. No evidence as to the merits of the case can be gone into in such an investigation. A Judge dismissing an application after allowing evidence to be taken upon the merits at such hearing has erroneously exercised a jurisdiction not vested in him by law and his order dismissing the application upon the merits can be set aside under S. 622, C. P. C.

*K. Ranganayaka Annal v. K. Venkata Chellapathy Nayudu*¹, followed.
*Vijendra Tirthaswami v. Sudhindra Thirthaswami*², overruled.

Petition under S. 622 of the Civil Procedure Code to revise the Order of the Court of the District Munsif of Salem in Civil M. P. No. 629 of 1901.

The facts were these. The plaintiff put in a petition to the District Munsif to be allowed to sue in *forma pauperis*. The District Munsif gave notice to the defendant under S. 408. Thereupon the defendant put in some documents affecting the merits of the case. The District Munsif received them and dismissed the petition on the ground that the petitioner had no right to sue in such Court. The petitioner thereon moved the High Court for revising the proceedings of the District Munsif as made without

* C. R. P. No. 453 of 1901.

31st July 1902.

1. I. L. R., 4 M. 323.

2. I. L. R., 19 M. 197.

jurisdiction and even if he had jurisdiction on the ground that it was tainted by material irregularity.

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This petition coming on first before their Lordships (Sir Charles Arnold White, the Chief Justice, and Mr. Justice Benson,) the Court made the following

ORDER OF REFERENCE TO THE FULL BENCH.—It seems difficult to reconcile the case reported in *K. Ranganayaka v. K. Venkatachellapati*¹ and the decision of *Subrahmania Aiyar, J.*, reported in *Vijendra Thirthaswami v. Sudhindra Thirthaswami*².

We accordingly refer to a Full Bench the question whether, on the facts of this case, the Munsif exercised a jurisdiction not vested in him by law or failed to exercise a jurisdiction so vested or acted illegally or with material irregularity in dismissing the application for leave to sue *in forma pauperis*.

S. Subrahmania Aiyar and *S. Venkataramana Aiyar* for petitioner.

*K. Ranganayaka Ammal v. Venkatachellapati Nayudu*¹ and *Debo Das v. Mohunt Ram Charn Dass Chella*² are in my favour. The only issue before the Munsif was whether petitioner was a pauper or not, and the enquiry was only an enquiry into the pauperism. The term "A right to sue" in S. 407 does not mean the question whether the suit is good or bad on the merits. Ss. 408 and 409 read together show that the inquiry is to be limited only to the question of pauperism. *Chattarpal Sing v. Raja Ram*³ is against me. A pauper if his application to sue as a pauper is dismissed can pay court fee and proceed with the suit. If there was already an adjudication on the merits, it will be a bar to the suit. S. 409 only says that the substance of the evidence is to be taken, while in a regular trial on the merits evidence will have to be taken regularly. Further there will be no right of appeal on such adjudication. Therefore it could not be that the Legislature meant that the Judge can go into the merits in an inquiry as to pauperism.

V. Visvanatha Sastri for counter-petitioner. Under Act VIII of 1859, the enquiry was confined to the question of pauperism alone. There was no provision there corresponding to the second

1. I. L. R., 4 M. 323. 3. I. L. R., 4 M. 323. 5. I. L. R., 7 A. 661.
2. I. L. R., 19 M. 197. 4. 2 C. W. N. 474.

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clause of S. 409. This was introduced by Act X of 1877. Mr. Broughton in his notes remarks the addition was to empower courts to have a more elaborate inquiry following the suggestion of *Jackson, J.* in *In re, Gunga Dass Adhikaree*.¹ Under the 2nd clause of S. 409, Courts can take evidence, such evidence as would bear on the points which form the prohibitions in S. 407 and referred to in the 2nd Clause of S. 409. The contention that 'the evidence as herein provided' in S. 409 means evidence about pauperism is not sound. The words "herein provided" should be read as *taken* as herein provided *i. e.*, the manner of taking the evidence, because the evidence under this chapter has to be taken by the Court itself. No Commissioner should be asked to take such evidence. See *In re Eknath Madoba*.² The section contemplates evidence on all the points, for the prohibitions mentioned in clauses (b), (c) and (d) can only be brought out by other evidence being also admissible. The Court is not bound simply by the allegations in the petition; *Kamrakh Nath v. Sundar Nath*.³ S. 406 empowers the Court to examine the applicant regarding the merits of the claim also. The enquiry under S. 409 is the final and more elaborate enquiry, and it cannot be said that the enquiry would have the merits shut from. In *K. Ranganayaka Ammal v. Venkatachellapathi Naidu*.⁴ the respondent was not represented; besides S. 409 was not referred to in the argument at all. In *Debo Das v. Mohunt Ram Charn Dass Chella*.⁵ also, S. 409 was not referred to. In *Vijendra Thirthaswami v. Sudhindra Thirthaswami*.⁶ the point was one of *res judicata* which is also proved by documentary evidence. In *Kamrakh Nath v. M. Sundra Nath*.⁷ the Court went into the question of the custom regarding the succession to a Mahantship of a Mutt. S. 407 (a) means whether he has a cause of action *i. e.*, a good and a reasonable ground for proceeding. See also Act VIII of 1859, Ss. 304, 306, *Chattarpal Singh v. Raja Ram*.⁸ It may not comprise the whole of the merits but may be a portion. Yet the Court has to go into evidence to determine the question whether there is a cause of action. In the case of an ordinary plaintiff, no doubt the plaint alone has to be looked at, but the policy of the

1. 14 W. R. 281.

2. 1 B. H. C. 102.

3. I. L. R., 20 A. 299.

4. I. L. R., 4 M.

5. 2 C. W. N. 474.

6. I. L. R. 19 M. 197.

7. I. L. R. 20 A.

8. I. L. R., 7 A. 661.

Legislature is to place greater checks on pauper petitioners. Otherwise the time of the Court would be wasted. The contention of *res judicata* is not tenable as this decision will not be in a *suit* within the meaning of S. 13 of the Code. The decision will have no more operation than for the inquiry under that Chapter.

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The Court delivered the following.

OPINIONS.—THE CHIEF JUSTICE:—On an application for leave to sue *in forma pauperis* the District Munsif fixed a day under S. 408 and held an investigation under S. 409 of the Code of Civil Procedure. At this investigation no evidence appears to have been given either in proof or in disproof of the pauperism of the applicant, but certain documents were put in evidence on behalf of the defendant; and the Court, relying on the decision reported in *Vijendra Thirthaswami v. Sudhindra Thirthaswami*¹ dismissed the application on the ground that the evidence on record showed the applicant had no subsisting cause of action. I think the evidence referred to in S. 409 is evidence in proof or disproof of the pauperism of the applicant—not evidence as to the merits of this case.

I cannot adopt the view taken by *Sir Subramania Aiyar, J.*, in the case of *Vijendra Thirthasami v. Sudhindra Thirthaswami*¹ and I think *K. Ranganayaka Ammal v. K. Venkatachellapathy*² was rightly decided.

I consider the Munsif acted illegally in allowing evidence to be put in on behalf of the defendant with reference to the merits of the claim of the party applying for leave to sue *in forma pauperis*, and in dismissing the application on the ground that on the evidence on record the applicant had no subsisting cause of action.

BHASHYAM AIYANGAR, J. :—I concur.

BENSON, J. :—I think that the decision in the case of *K. Ranganayaka Ammal v. K. Venkatachellapathy Nayudu*² states the law applicable to the facts of the present case correctly. I am unable to reconcile it with the decision *Vijendra Thirthaswami v. Sudhindra Thirthaswami*¹ and with every respect for the

1. I. L. R., 19 M. 1107.

2. I. L. R., 4 M. 323.

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learned Judge who decided the case, I must say that I am unable to concur in the view taken by him as to S. 409, Civil Procedure Code. The Full Bench case of *Chattarpal v. Raja Ram*¹ is not opposed to the view I take.

The District Munsif in the enquiry made under S. 409 allowed witnesses to be examined and documents put in evidence as to the merits of the petitioner's claim and then decided on the strength of that evidence that the petitioner had not a good case on the merits and therefore dismissed his suit. This course was not warranted by law. The evidence should have been confined to the question of the petitioner's pauperism. If that was proved, and if the plaint supplemented by the examination of the petitioner held under S. 406 showed that he had a right to sue, the District Munsif ought to have allowed the petition and proceeded to hear the suit in due course. The receipt of evidence as to the merits during the enquiry into pauperism and the decision of the case on the merits at that stage was, in my judgment, a material irregularity and, in practice, would be likely to lead to waste of the Court's time and to confusion and irregularity of procedure.

I would, therefore, answer in the affirmative the question referred for our decision.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—Sir Charles Arnold White, *Chief Justice*,
and Mr. Justice Davies.

Gandham Veeraswami and others ... Appellants*
(*Plaintiffs*).

v.

Manager, Pittapur Estate ... Respondent.
(*Defendant*).

Veerasawmi *Civil Procedure Code, Ss. 2, 414 A, 562, 584 and 588 (28)—Rent Recovery Act (VIII*
v. *of 1865, Madras), S. 69—Decision of Collector in summary proceedings under Act*
Manager, *—Judgment—Decree—Civil Court—Remand order.*
Pittapur
Estate.

A District Judge has jurisdiction under S. 562, C. P. C., to remand a summary suit under Act VIII of 1865 when there has been an appeal from the decision of the

* C. M. A. No. 9 of 1902.

17th December 1902.

5. I. L. R., 7 A. 661.

Sub-Collector in such suit and hence an appeal will lie under S. 588, cl. (28) C. P. C., *Veerasawmi v. Madager, Pittapur Estate.*
from such order of remand.

A decision of a Collector in a Summary Suit is a decree within the meaning of S. 2, C. P. C., and decides a civil question between parties seeking civil rights.

Appeal from the order of remand of the District Court of Godavari, in A. S. No. 59 of 1901, presented against the decision of the Court of the Sub-Collector of Godavari, in S. S. No. 17 of 1900.

V. Ramesam for appellants.

A. S. Krishnaswami Iyer for *V. C. Desikachariar* for respondent raised a preliminary objection that there was no appeal against the remand order. The Civil Procedure Code does not apply to rent cases under the Rent Recovery Act unless where it is said expressly to apply. I would refer to Ss. 69 and 74. (*Davies, J.* How is it that a second appeal is preferred against the decree in a rent appeal). That is under S. 584, C. P. C., and not under any provision in the Rent Recovery Act.

The Court delivered the following

JUDGMENT :—This is an appeal from an order of the District Judge reversing a finding of the Sub-Collector in proceedings under Act VIII of 1865 and remanding the suit for disposal on the merits. The order purports to have been made under S. 562 of the Code of Civil Procedure.

A preliminary objection has been taken that no appeal lies. In support of the objection it has been argued that the adjudication by the Sub-Collector was not a "decree" within the meaning of S. 562 of the Code, that this being so, the order of remand cannot be taken to have been made under that section, and that inasmuch as S. 588 (28) of the Code only gives a right of appeal when the order is made under S. 562, if the order was not under that section no appeal would lie.

We are of opinion that it was competent for the District Judge to make the order under S. 562.

No doubt S. 69 of Act VIII of 1865 uses the word "Judgment," but we think the Judgment, or adjudication, by the Sub-

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Collector in the present case is a formal expression of an adjudication upon a right claimed within the meaning of the definition of decree contained in S. 2 of the Code. We also think it is a "formal expression upon a right claimed in a Civil Court."

In *Kotappa v. Venkataramiah*¹ this Court considered this last point with reference to the right of second appeal conferred by S. 584 of the Code and held that for the purposes of that section an adjudication by the Collector in proceedings under Act VIII of 1865 amounted to a decree as defined by the Code. As pointed out by the Judicial Committee in the case reported in *Nilmoni Singh Deo v. Taranath Mukerjee*² there is a distinction between Civil Courts and Rent Courts, but a Rent Court is a Civil Court in the sense that it decides a civil question between persons seeking their civil rights.

There is nothing in the S. 4 of the Code which is inconsistent with the view above expressed.

To say that the adjudication in question in the present case is a 'decree' within the meaning of S. 540 of the Code does not affect any "special procedure" prescribed by Act VIII of 1865. Moreover S. 4 A, a comparatively recent enactment clearly contemplates Revenue Courts being governed by the provisions of the Code of Civil Procedure.

We think the preliminary objection fails and must be overruled.

On the merits, in our judgment, the question of the propriety of the pattah cannot be satisfactorily determined until there have been findings on the other issues in the case. On this ground we think the order of remand ought not to be interfered with.

The appeal is dismissed. The costs of this appeal will abide the result of the suit.

1. 10 M. L. J. R. 398.

2. I. L. R., 9 Cal. 295.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.
Venkataramanuja Reddiar and another .. Appellants* (*Plaintiffs*).

v.

Subbaraya Pillai Respondent (*Defendant*).

Sale of land—Vendee's suit for possession against third parties—Failure of vendor to get possession—Suit against vendor for possession or for damages—Futile prayer—Small Cause nature.

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Where a purchaser of some land sued third parties for possession of the land and failed ultimately and afterwards brought a suit against his vendor for being placed in possession or for damages.

Held :—(1) that the prayer for possession was a futile one and could not be given effect to ;

(2) that the suit must be regarded as one for damages merely ;

(3) that such suit was cognizable by a Small Cause Court and that, therefore, no second appeal lay.

Second Appeal from the decree of the District Court of Chingleput in A. S. No. 109 of 1900, presented against the decree of the Court of the District Munsif of Poonamallee in O. S. No. 469 of 1899.

The plaintiff's case was that the defendant sold to the 1st plaintiff a piece of land and put the latter in possession, that the 1st plaintiff was dispossessed by some third persons, that he thereupon brought a suit against those third persons to recover possession but failed. The plaintiffs as members of an undivided family now sued the defendant to place them in possession of the land or to pay damages for breach of contract. The District Munsif gave the plaintiffs a decree for damages, but the District Judge reversed it on the ground that their claim was barred by limitation. Hence this second appeal.

K. Ramachandra Aiyar for *V. Krishnaswami Aiyar* for appellants.
A. S. Balasubramania Aiyar for *P. R. Sundara Aiyar* for respondent.

The Court delivered the following

JUDGMENT.—A preliminary objection is taken that the suit is really one for damages, and as such one of a nature cognizable by a Court of Small Causes and that no second appeal lies, the claim being for less than Rs. 500. We think the objection is well-founded. The prayer for possession of the land is a futile one, that could not possibly be given effect to, as the land is in possession of third parties, who have already as stated in the plaint established their right to possession as against the plaintiff. We must dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Chief Justice*,
and Mr. Justice Subrahmaniam Aiyar.

Saminatha Aiyar ... Appellant* (*Defendant*).

v.

Venkatasubba Aiyar ... Respondent (*Plaintiff*).

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Venkata-
subba Aiyar.

Civil Procedure Code—Order rejecting appeal as out of time—Decree—Second Appeal—Judgment pronounced by Court after 4 P.M.—Court closed for Christmas—Application for copy on the first day of re-opening—Time requisite for obtaining copies Computation of Time.

An order rejecting an appeal as being presented out of time is a decree, and a second appeal lies to the High Court from such decree.

Gulab Rai v. Mangli Lal,¹ *Ragunatha Gopal v. Nilu Nathoji*,² *Ganga Das Dey v. Ramjoy Dey*,³ *Ayyanna v. Nagabushanam*,⁴ and *Zamindar of Tuni v. Bennayya*⁵ followed.

Where judgment was pronounced in a suit at 4 P.M., on the last day the Court sat before the Christmas holidays, and according to the practice of the Court no papers would be received after 4, and application was made for copy of the judgment on the day the Court re-opened for the first time after Christmas.

Held:—That an appeal presented within 90 days after deducting the Christmas holidays when no application could have been presented was in time, and that the appellant was entitled to a deduction of such time under the circumstances as being time requisite for obtaining copies of the judgment.

Second appeal from the orders of the District Court of Trichinopoly in S. R. Nos. 277 and 50 of 1901, presented against the decrees of the District Munsif of Kulitalai in O. S. Nos. 234 of 1900 respectively.

T. Subrahmaniam Aiyar for *P. S. Sivaswami Aiyar* for appellant.
K. Ramachandra Aiyar for respondent.

The Court delivered the following

JUDGMENT:—This is an appeal from an order rejecting an appeal on the ground that it was out of time. A preliminary objection has been taken that no appeal lies as the order is not a decree as defined by S. 2 of the Civil Procedure Code. If we had to consider the point apart from authority, we might have felt disposed to adopt the view put forward on behalf of the respondent. The balance of authority, however, is strongly against this view. The precise point was decided against the respondent in *Gulab Rai v. Mangli Lal*¹ and *Ragunatha Gopal v. Nilu Nathoji*,² *Ganga Dass Dey v. Ramjoy Dey*³). The principle of these

* S. A. Nos. 1637 of 1901.

1. I. L. R., 7 A. 42.

2. I. L. R., 9 B. 452.

3. I. L. R., 12 C. 30.

4. I. L. R., 16 M. 285.

7th April 1903.

5. I. L. R., 22 M. 155.

decisions was applied by this Court in the cases of (*Ayyanna v. Nagabhooshanam*¹ and *Zemindar of Tuni v. Bennayya*²).

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subba Aiyar.

Having regard to these authorities we are not disposed to say that no appeal lies in the present case. The preliminary objection is overruled.

In this case judgment was delivered on December 22, 1900, the last day before the Christmas vacation at 4 P. M. when, according to the practice of the Court, papers were not received. The appellant made his application for a copy of the judgment on January 7th, 1901, the day on which the Court re-opened after the Christmas holidays, and presented his appeal on a day which would be in time if he is entitled to deduct the period during which the Court was closed. His contention is that, in computing the period for appeal, the time during which the Court was closed should be deducted.

The contention on the other side is that inasmuch as no application for a copy of the judgment was made before the Court closed, the appellant is not entitled to have the period during which the Court remained closed deducted in the computation of time. The argument was that the words "requisite for obtaining a copy of the judgment" pre-suppose an application for the copy. There is nothing in the section itself to suggest that these words ought to be so construed. It is not impossible to conceive of cases where time may properly be deducted though the commencement of the period from which time is deducted precedes the actual application for a copy of the judgment. On the facts of the present case, we think it may be said that this is not one of those cases. For this reason, we think the appellant is entitled to deduct the period from December 23rd to January 6th, both days inclusive as such period, in the circumstances of the case, must be taken to be part of the time requisite for obtaining a copy of the judgment.

We must, therefore, set aside the order of the District Judge and direct him to receive the appeal and proceed with it according to law. The costs of this appeal will abide the event.

1. I. L. R., 16 M. 285.

2. I. L. R., 22 M. 155.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Moore.

Venkatrayudu ... Appellant.* (*Plaintiff*).

v.

Subbamma and others ... Respondents. (*Defendants*).

Venkatrayudu v. Subbamma. *Hindu Law—Oral gift by father to his daughter—Title invalid—Possession of donee adverse—Prescription for full estate—Right of reversioner to question.*

Subbamma. When under an oral gift made in 1884 (which was invalid under the Transfer of Property Act) by the last male owner to his daughter the latter remained in possession for over 12 years :—

Held :—(1) that she prescribed for a full estate.

(2) that the possession of the donee was adverse to the donor and his representatives whether the title was valid or otherwise ; and

(3) that a reversioner claiming through the donor's son cannot question such possession after the expiry of 12 years.

Second Appeal from the decree of the Subordinate Judge's Court of Kistna at Masulipatam in A. S. No. 116 of 1900, presented against the Decree of the Court of the District Munsif, Tenali in O. S. No. 138 of 1899.

The 1st defendant is the widow of the last owner. The plaintiff is the reversioner. The 2nd defendant is his sister ; the 3rd is his mother ; the 4th defendant is the father of the 1st. The 5th and 6th defendants are the alienees of the 2nd defendant. In 1894 the 4th defendant as guardian of his daughter executed a deed of gift in favour of the 2nd defendant. The deed recites that the father of the last owner made the gift to his daughter, the 2nd defendant, in 1884 and put her in possession of the property, that the 2nd defendant was in possession ever since 1884 and that in order to confirm her in her rights the deed was executed. The present suit was for a declaration that the gift by the 1st defendant would not be binding after her lifetime.

T. V. Seshagiri Aiyar for appellant.

P. Nagabhushanam for respondents.

The Court delivered the following

JUDGMENT :—The finding is that possession passed to the 1st defendant under the oral gift in 1884. In our opinion that

possession was adverse to the title of the donor. Both the 1st defendant and the donor believed that the 1st defendant's title to the land was good, and that she held it as owner by virtue of the oral gift. She did not admit that any right any longer existed in the donor. She prescribed for the full ownership as against the donor and every one else from 1884, and her possession was, therefore, adverse whether her title was valid or not. The appellant relies on the cases *Rajah Haimun Chull Singh v. Koomer Gunsheam Singh*¹ and *Labrador Company v. The Queen*², but we do not think that the principle of those cases applies in the present case. We dismiss the second appeal with costs.

Venkatra-
yudu
v.
Subbamma.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Amirdam, minor by her guardian,
and maternal uncle Muthu-

kumara Chetty ... Appellant * (2nd Defendant).
v.

Muthukumara Chetty ... Respondent (Plaintiff).

Document being of two descriptions—Gift and appointment of guardian—Document operative as to the appointment of guardian—Death of executant before registration—Gift inoperative—Registration of document so far as regards appointment of guardians—Description of property to be managed—Registration Act, S. 21—Power of attorney.

Amirdam
v.
Muthuku-
mara Chetty.

A document which is in part an appointment of the guardian of the person and property of certain minors is not a document relating to immoveable property within the meaning of S. 21 of the Registration Act any more than a power of attorney authorizing an agent to collect rents of immoveable property is.

Such a document can be compulsorily registered although it contained no description of the properties referred to in it.

Where a person executes a deed of gift but dies before it is registered the gift is incomplete and the legal representatives of the donor cannot be compelled to complete such incomplete gift.

Where a document is in part operative but is inoperative as to the rest, the document may be registered as to the part that is operative, but the registrar must add a declaration that it is only as regards the part that is operative that registration will take effect.

* A. A. O. No. 129 of 1902.

2nd February 1903.

1. 5 W. R. P. C., 69.

2. 1893 A. C. 104 at 122.

Amirdam
v.
Muthuku-
mara Chetty.

Appeal from the order of the Subordinate Judge's Court of Kumbakonam, dated 15th July 1902 in A. S. No. 32 of 1902, presented against the decree of the Court of the District Munsif of Mayavaram in O. S. No. 132 of 1901.

One Devakannu executed a deed of settlement in favour of plaintiff on the 2nd August 1900, the material portion of which run as follows :—

“As you, the said Muthukumaran Chetty, were about ten years under my protection and had your marriage celebrated by me alone, later as you were protecting me, etc., for the period of three years during the period of my weakness with illness, as I, my daughters and my mother are under your protection, and as I have taken you as foster-son for the purpose of protecting me and my mother in our life-time and for afterwards doing funeral obsequies, etc., owing to my not having male heirs, I have left this day in your enjoyment the following remaining properties belonging to me excepting the lands mentioned in the inam deed executed by me this day to (1) my married eldest daughter Muthammal, aged 12 and (2) my unmarried second daughter Amirtham, aged 8.”

The plaintiff produced it before the Sub-Registrar, but Devakannu died before it could be registered. Devakannu's daughters denied execution and the Sub-Registrar refused registration.

On appeal the District Registrar refused registration on the ground that the document did not contain a description of some of the properties referred to in the document. Hence this suit by the plaintiff under S. 77 of the Registration Act for directing registration of the document.

The District Munsif dismissed plaintiff's suit. On appeal the Subordinate Judge held that the description of the property which was only secondarily dealt with in the document need not be given and remanded the suit. Hence this second appeal by one of the daughters.

T. R. Venkatarama Sastri for appellant.

C. V. Krishnaswami Aiyar for *R. Kuppusami Aiyar* for respondent.

The Court delivered the following

JUDGMENT:—The document the registration of which the plaintiff seeks to compel is in part a deed of gift (subject to an

obligation) and in part an appointment of a guardian of the person and property of certain minors.

Amirdam
v.
Muthuku-
mara Chetty.

We are unable to uphold the ground on which the District Registrar refused registration. The document so far as it appoints a guardian is not a document relating to immoveable property within the meaning of S. 21 of the Indian Registration Act any more than a power of attorney authorizing an agent to collect rents of immoveable property is such a document. Registration, therefore, of that part of the document can be compelled as against the legal representatives of the executant if the document was really executed by the executant just as its registration could have been enforced against the executant himself if alive.

But so far as the document is a deed of gift though an onerous one, its registration cannot be compelled, either against the donee or his legal representatives since that would be compelling the donor or his legal representatives to complete an incomplete gift. *Ramamirtha Iyan v. Gopalu Ayyan*¹ and *Meiyyalu Nadan v. Anjalay*². The remand by the Subordinate Judge in order to have the question as to the genuineness of the document decided is correct. If the document is found to be genuine, the District Munsif should order it to be registered but with the proviso that the registration is to take effect only so far as the document is one appointing a guardian. The effect of this will be that the document so far as it is a deed of gift will not take effect as a registered deed of gift for the purposes of the Transfer of Property Act. The deeds of gift in favour of the daughters referred to in the document before us being admittedly unregistered and the contemplated gift in favour of respondent also failing for want of registration, the question as to whether the document will take effect as an appointment of the respondent as guardian of the minors is one which it is unnecessary to decide in this suit. The costs of this appeal will be costs in the cause.

1. I. L. R., 19 M. 433.

2. I. L. R., 25 M. 672.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*,
and Mr. Justice Subrahmaniam Aiyar.

Singaravelu Udayan ... Appellant in both* (*Plaintiff*).

v.

Ramayer... ... Respondent in S. A. No. 932 of
1900 (*25th Defendant*).

Singaravelu Udayan *Mortgagor and mortgagee—Sub-mortgage by mortgagee—Suit for sale by mortgagee—*
v. *Sub-mortgagee no party—Sale-proceeds realized—Right of sub-mortgagee to a lien*
Ramayer. *over proceeds—Transfer of Property Act, S. 138.*

Where a mortgagee brings a suit for sale and money is realised and brought in to court, a sub-mortgagee has no lien over the fund in court.

Where certain money decree-holders of the mortgagee attach the money in Court and draw the same, a sub-mortgagee cannot compel them to refund any portion of the said money.

S. 138 of the Transfer of Property Act refers only to the transfer of a debt and has no application to a sub-mortgage by the mortgagee.

Second Appeals from the decrees of the District Court of Tanjore in A. S. Nos. 232 and 239 of 1899 presented against the Decrees of the Court of the District Munsif of Kumbakonam in O. S. No. 1 of 1898.

Defendants 4 and 5 executed a mortgage of their properties to the 2nd defendant in his capacity as guardian of 1st defendant. The 1st defendant hypothecated his mortgage interest in these properties to the plaintiff's family now represented by the plaintiff.

The defendants 1 and 2 sued in 1888 the mortgagors (defendants 4 and 5) and others upon his mortgage without making the plaintiff a party. They obtained decrees, brought the mortgaged properties to sale and drew the money out of Court. The balance of the surplus sale proceeds was drawn by some of the defendants and by the 3rd defendant who was the Vakil for the defendants 1 and 2 in the mortgage suit of 1888 and to whom fees were due, in pursuance of an attachment issued in execution of a money decree obtained by him. The plaintiff brings this suit for sale of the mortgaged properties on the ground that the decree of 1888 was not binding on him and in the alternative for recovery of the moneys drawn by the defendants 1 to 3. The District Munsif held that the plaintiff was entitled to the moneys realized in

* S. A. Nos. 932 and 933 of 1900.

28th January 1903.

execution of the decree of 1883 and that the defendants 1 to 3 and some other defendants who drew the money out of Court were liable for the amount so drawn. He gave a decree for the plaintiff for the mortgage amount and also decreed that the plaintiff was entitled to the fund in Court and that the defendants who drew the money must recoup it to the plaintiff.

Singaravelu
Udayan
v.
Ramiyer.

Defendants 3 and 25 who were some of the defendants who drew the surplus sale proceeds out of Court appealed and the District Judge reversed the decree of the District Munsif so far as they were concerned. Hence this second appeal.

A. Nilakanta Aiyar for *V. Krishnaswami Aiyar* for appellant in S. Nos. 932 and 933 of 1900.

K. Ramachandra Aiyar for *P. R. Sundara Aiyar* for respondent in S. A. No. 932.

L. Narayana Aiyar for *P. S. Sivaswami Aiyar* for respondent in S. A. Nos. 933 of 1900.

The Court delivered the following

JUDGMENT :—The plaintiff's contention is that he has a lien on the moneys in the hands of the 3rd and 25th defendants, on the ground that these moneys are the proceeds of the sale of the 1st defendant's (the plaintiff's mortgagor's) interest in the land. No authority has been cited which supports this contention, and we do not think it is well-founded. S. 138 of the Transfer of Property Act relates to the transfer of a debt and has no application to the present case, *Gurney v. Seppings*¹. No question of the right to follow moneys into the hands of third parties was involved.

The only question was with reference to the rights of the parties to the mortgage transactions, and this case, so far as it is in point at all, is an authority against there being anything in the nature of a charge from the mere fact of realization. The fact that the 3rd and 25th defendants received the moneys with notice of the plaintiff's mortgage does not, it seems, create any equity in his favor as against them.

The second appeals are dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Gopalu Chetty *Appellant
(Plaintiff).

v.

Subbier Respondent
(2nd Defendant).

Gopalu
Chetty
v.
Subbier.

*Civil Procedure Code, Ss. 108 and 588—Decree against several defendants ex parte—
Application by one to set aside—Ground not common to others—Order setting aside
decree against all—Appeal from final decree.*

Where plaintiff obtains a decree against several defendants *ex parte* and one of the defendants applies under S. 108, C. P. C., to set aside the decree passed against him *ex parte* on a ground not common to the other defendants, the decree cannot be set aside as against such defendants.

An order under S. 108, C. P. C., setting aside the decree *in toto* as against all the defendants is not appealable under S. 588 but may be questioned in an appeal against the final decree.

Quere :—Whether an order setting aside the decree on the application of one of the defendants under S. 108 will disturb the decree as regards the other defendants when the decree is passed on grounds common to all of them.

*Mahomed Hamidulla v. Tohurunnissa Bibi*¹, considered and explained.

*Bhura Mal v. Harikishan Das*², referred to.

Second appeal against the decree of the District Court of Chingleput in A. S. No. 83 of 1900 affirming the decree of the Court of the District Munsif of Trivellore in O. S. No. 641 of 1899.

P. S. Sivaswami Aiyar for appellant.

K. B. Krishnaswami Aiyangar for *T. V. Seshagiri Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—The appellant sued on a promissory note made by the 1st defendant alone and joined the undivided nephew of the 1st defendant as a party (2nd defendant) to the suit on the

¹ S. A. No. 1088 of 1901.

1. I. L. R., 25 C. 155.

3rd February 1903.

2. I. L. R., 24 A. 383.

ground that the promissory note was for a debt binding on the family including the 2nd defendant.

Gopalu
Chetty
v.
Subbier.

Neither defendant appeared and the District Munsif on the 25th August 1899 passed a decree *ex parte* against both the defendants, which, as properly construed, means that the 1st defendant, the maker of the note, is personally liable for the sum sued for, and that the plaintiff is entitled to recover the amount decreed also from the interest of the 2nd defendant in the joint family property. This decree proceeds on the footing that the debt was incurred for a family purpose. The 2nd defendant alone applied under S. 108, C. P. C., alleging that he was not duly served with a summons and praying that the decree passed against him *ex parte* might be set aside. The District Munsif set aside the decree *in toto*, that is, as against both the defendants. There being no appeal against such an order, it is open to the appellant in appealing against the final decree in the case to object to such order as contrary to law, and he accordingly contends that the decree passed *ex parte* should be restored as against the 1st defendant. In our opinion this contention is well-founded under the circumstances of the case. There is no contention as to the making of the note and the consideration therefor. That being so, the contention of the 2nd defendant that the debt was one not binding upon him is a defence peculiar to him and not one common to him and the 1st defendant. We are therefore clearly of opinion that the District Munsif was not warranted by law in setting aside the decree as against the 1st defendant, as the correctness of the decree does not depend on the character of the debt. If the decision in *Mahomed Hamidulla v. Tohurunnissa Bibi*¹, relied upon by the District Judge, really means that, if an application made by any one defendant under S. 108 of the Code of Civil Procedure be granted, the whole decree must be set aside in favour of all other defendants whether *ex parte* or not and whether they applied under S. 108 or not, we are with great respect unable to concur. But having regard to the decision of the same Bench in the subsequent case of *Monomohini Chowdharani v. Nara Narayan Ray Chowdhri*², we are inclined to think that such is not the effect of that decision.

1. 1. L. R., 25 Cal. 155.

2. 4 Cal. W. N. 456.

Gopalu
Chetty
v.
Subbier.

Whatever doubt may exist in a case in which the decree sought to be set aside under S. 108 proceeds on a ground common to the applicant and another defendant who has not applied under that section, we entertain no doubt in a case like the present in which the decree does not proceed on a ground common to both the defendants (see *Bhura Mal v. Har Kishan Das*¹). The District Munsif in his revised decree held that the debt was not binding on the 2nd defendant and passed a decree against him merely as the legal representative of the 1st defendant, the 1st defendant having died subsequent to the order setting aside the decree *ex parte*. As in our opinion, the decree passed *ex parte* against the 1st defendant ought not to have been set aside, we reverse the decree of the lower appellate Court and the revised decree of the District Munsif, dated 2nd February 1900 and restore his original decree, so far as it directs the 1st defendant to pay the amount decreed with interest and costs.

The effect of this will be that the decree against the 1st defendant is one which was passed during his lifetime, and it will have to be executed against his legal representative under S. 234, C P. C. In this view the decision of this Court in *Ramanayya v. Rangappayya*² as to the effect of attachment before judgment in a case in which the defendant being an undivided member of a Hindu family dies before judgment has no application to the present case.

In executing the decree under section 234 the question as to whether by reason of the attachment pending suit the share of the deceased judgment-debtor should also be regarded as assets of the deceased in the hands of the 2nd defendant will have to be decided.

As the appellant has failed as against the 2nd defendant he must pay his costs throughout, but he will be entitled to recover his costs throughout from the estate of the 1st defendant*.

1. I. L. R., 24, A. 383.

2. I. L. R., 17, M. 144.

* [See *Shaida Husain v. Hub Hussain*, I. L. R., 25 A. 45 and *Tassadug Hussain v. Hayat-un-Uissa*, I. L. R., 25 A. 283, Ed.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Venkata Satyanarayana, minor, by father

and guardian Kalle Ramamurthy ... Appellant* (*Petitioner*).

v.

Venkata Rangayya ... Respondent (*Counter-Petitioner*).

Arbitration, contract to refer to—Rule of Court—Death of one party, effect of—Revocation of contract only for just and sufficient cause—Leave of Court—Civil Procedure Code, Ss. 367 and 523.

Venkata
Satyanara-
yana
v.
Venkata
Rangayya.

Under the English common law the authority of an arbitrator may, at any time before the award is made, be revoked at the pleasure of any party to the submission whether such submission be by agreement in writing, bond, deed or Judge's order or order at *nisi prius*.

Such authority is, therefore, revoked in England by the death of any one of the parties to the submission.

*Potts v. Ward*¹; *Toussaint v. Hartop*²; *Cooper v. Johnson*³, and *Rhodes v. High*⁴, referred to.

This rule of English common law has not been followed in India so that contracts to submit to the decision of an arbitrator are not revocable at the mere will or pleasure of the parties.

*Narayanasami Naik v. Rangasami Naik*⁵ followed.

A submission which has not been made a rule of court is not revocable without just and sufficient cause, and a submission which has been made a rule of court can be revoked only with the leave of court for good cause shown.

*Pestonjee v. Manockjee*⁶ referred to.

Where an uncle and his nephew who were members of a joint family entered into an agreement in writing to submit their disputes relating to the partition of their joint property to the decision of some arbitrators, and the uncle applied under S. 523 to have the agreement filed and the application was registered and numbered as a suit but pending the proceedings before the arbitrators the uncle died and his daughter's son alleging himself to be the adopted son of the deceased, applied to continue the suit.

Held (1) that the suit did not abate;

(2) that the contract of submission not being personal to the deceased was not revoked by the death of one of the parties; and

(3) that the procedure prescribed in S. 367, C. P. C., was the one that should have been adopted.

Appeal from the order of the District Court of Godavari at Rajahmundry, dated 21st July 1902, and passed on C. M. P. No. 144 of 1902 in O. S. No. 16 of 1901.

* A. A. O. No. 139 of 1902.

2nd April 1903.

1. 15 E. R., 580.

3. 2 B. & Ald. 394.

5. 8 M. H. C. 46.

2. 7 Taunt 57.

4. 2 B. & C. 435.

6. 12 M. I. A. 112.

Venkata
Satyanara-
yana
v.
Venkata
Rangayya.

K. Jagannatha Aiyar for *V. Ramesam* for appellant.

K. Subrahmanya Sastri for respondent.

The Court delivered the following

JUDGMENT :—One Thiruvengatam, deceased, and his nephew Venkatarangayya, who were the members of an undivided Hindu family entered on the 25th December 1900 into an agreement in writing to submit to the decision of certain persons the disputes which had arisen between them with reference to the partition of their joint property and to abide by the partition to be made by them. On the 25th March 1901 Thiruvengatam applied under S. 523 of the Code of Civil Procedure to the District Court of Godavari to have the agreement filed. Venkatarangayya on notice to him having consented to the agreement being filed, the application was numbered as a suit and the matter was referred to the decision of the arbitrators named. Pending the proceedings before the arbitrators Thiruvengatam died on the 18th August 1901. Thiruvengatam's daughter's son, Satyanarayana, a minor, who is the appellant before us, alleging himself to be the adopted son of Thiruvengatam, applied through his natural father as his next friend, under S. 365 of the Code of Civil Procedure to have his name entered on the record in the place of the deceased plaintiff Thiruvengatam. The adoption thus set up was denied by the defendant-respondent. Without pursuing either procedure prescribed by S. 367 of the Code of Civil Procedure in reference to the determination of the question whether Satyanarayana was the legal representative of the deceased Thiruvengatam, the District Judge passed an order abating the suit. In support of the Judge's order attention was drawn to *Potts v. Ward*¹, *Toussaint v. Hartop*², *Cooper v. Johnson*³ and *Rhodes v. High*⁴, which lay down that the authority of an arbitrator is revoked by the death of any one of the parties to the submission before an award is made. This was apparently a corollary of the rule of Common Law that the authority of an arbitrator might, at any time before the award was made, have been revoked at the pleasure of any party to the submission whether the submission was by agreement in writing, by bond, deed, judge's order or order at *nisi prius*,—a rule apparently founded on the view that

1. 1 Marshal 366; 15 B. R. 680.

3. 2 B. & Ald. 394.

2. 7 Taunt. 57.

4. 2 B. & C. 435.

with reference to agreements to refer to arbitration any contracting party may, without the consent of the others, put an end to the contract on the mere ground that he has changed his mind, and which was due to the disfavour with which contracts to refer to arbitration were formerly looked upon in England as contracts tending to oust the jurisdiction of the ordinary courts. But in this country, as pointed out in the case of *Nagasamy Naik v. Rangasami Naik*¹, the policy of the Legislature has always been different, and the English Common Law Rule has not been followed. According to the law here, the submission of an existing dispute once made is not without just and sufficient cause revocable, even in the case of a submission which has not been made a rule of Court, while with reference to a submission which has been made a rule of Court, and consequently where the matter has become the subject of a suit, the submission can be revoked only with the leave of the Court for good cause shown (*Pestonjee v. Manockjee and Co.*²).

Venkata
Satyannara-
yana
v.
Venkata
Rangayya.

It follows, therefore, that contracts to refer to arbitration should not in this country be treated upon the peculiar footing that such contracts are revocable at the mere will of a party so as to warrant the view that every such contract is essentially of a personal nature as the District Judge seems to have thought; and the question whether a legal representative of a deceased party is or is not entitled to enforce the contract to refer is a question which would depend upon whether the right dealt with in the reference is of a merely personal nature or is one which survives to the legal representative. Accordingly where the submission has been made a rule of Court and the right is one which falls under the latter description, the proceedings must, under S. 361 of the Code of Civil Procedure, be held not to abate by reason of the death of a party, and as the right to partition, which is the subject-matter of the submission in the present case, would survive to the deceased plaintiff's adopted son, if there is one, the District Judge should have proceeded under S. 367 of the Code of Civil Procedure.

We accordingly set aside this order and direct that the application be restored to his file and dealt with according to law. The costs of this appeal must be costs in the cause.

1. 8 M. H. C. R. 46.

2. 12 M. L. A. 113.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Moore.

Moidu Haji ... Appellant * (*Plaintiff*).

v.

Kunhi Moidu and others. ... Respondents (1 to 5 and
7 to 10 *Defendants*).

Moidu Haji *Kanom—Time-expired—Usufructuary mortgage by Kanomdar—Redemption by jenmi—*
 v. *Knowledge of risk—Mortgagee's right to claim interest or loss of profits.*
 Kunhi
 Moidu.

Where a time-expired but unredeemed kanom is usufructually mortgaged to a person who knows it is time-expired and there is no provision in this second mortgage for interest, the mortgagee of the kanom interest will, on redemption of the kanom and recovery by the jenmi of the properties demised on kanom, not be entitled to claim either interest or loss of profits.

Second Appeal from the decree of the District Court of South Malabar in A. S. No. 901 of 1899, presented against the decree of the Subordinate Judge's Court of Calicut in O. S. No. 40 of 1898.

P. S. Sivaswami Aiyar for *V. Krishnaswami Aiyar* for appellants.

K. Ramachandra Aiyar for *P. R. Sundara Aiyar* for respondents.

P. S. Sivaswami Aiyar :—The plaintiff is the purchaser of the equity of redemption in items 1 and 2 from defendants 4 to 9 who had mortgaged their kanom rights to defendants 1 to 3. The mortgage was a usufructuary mortgage. There is no provision for interest. Items 3 to 5 have been redeemed already by the jenmi in 1877. The kanom to defendants 4 to 9 was in 1853. In 1875, the defendants 1 to 3 had a mortgage of the kanom interest of defendants 4 to 9. It was at that time evidently a time-expired kanom. The defendants 1 to 3 claimed interest on the mortgage amount inasmuch as they were deprived of a portion of the property. There was no covenant for interest. Whatever might have been expected by the defendants 1 to 3, it cannot be said there was a guarantee or covenant for quiet enjoyment. If there was a covenant at all, it could be held only to have been a personal covenant, and the mort-

* S. A. No. 670 of 1901.

2nd September 1902.

gagē's remedy is to sue the mortgagor for compensation for breach of the covenant. *Mahadaji v. Joti*¹. That too is now time barred. *Nanu Menon v. Komu Nair*². Vide S. 72, Transfer of Property Act. The mortgagor could have given in mortgage only the rights he had. He could have covenanted only for so much and not more. *Dhondo v. Balakrishna*³.

Moidu Haji
v.
Kunhi
Moidu.

The inaction of defendants 1 to 3 for 21 years also supports the plaintiff's case.

K. Ramachandra Aiyar for the respondent.

There is nothing to compel the mortgagee to seek compensation until the time for redemption. It is clear here that the mortgagee expected to be left in quiet enjoyment of the whole property. The fact that he was deprived of a portion of the property entitles him for compensation. Though there is no provision for *post diem* interest in certain transactions, the Courts allow interest *post diem* at the rate provided in the document. That analogy is here applicable.

The Court delivered the following

JUDGMENT :—We think that the construction placed upon Exhibit C by the learned District Judge cannot be supported.

No doubt the parties hoped and it is even not improbable that they may have expected, that the kanom right mortgaged by defendants 6 to 9 to defendants 1 to 3 would not be redeemed during the ten years for which the mortgage was to run ; but there was certainly no express covenant for quiet enjoyment for that term, nor do we think that such a covenant ought to be inferred. The dates of the kanoms which were mortgaged were stated in the document, and the parties must have known, as every one in Malabar does know, that a kanom is liable to be redeemed after 12 years, and that therefore in this case the kanom over items 3, 4 and 5 was liable to be redeemed at any time. The defendants 1 to 3, we think, took the mortgage knowing of the existence of this risk, though they may have hoped that the kanom would not be redeemed. We find that it was in fact redeemed within two years of the mortgage, and defendants 1 to 3

1. I. L. R., 17 B. 425. 2. I. L. R., 21 M. 42 at p. 44. 3. I. L. R., 8 B. 190.

Moidu Haji
v.
Kunhi
Moidu.

then behaved exactly as they would have behaved if they had expected the redemption. They did nothing at all. They did not sue for their mortgage money, as they might have done when their security was diminished: they made no remonstrance with their mortgagors; they made no claim to be reimbursed for the unexpected loss of profits, and gave no notice that they would take accounts of the loss when the mortgage was paid off. They, in fact, did nothing whatever for 18 years until this suit was brought. We do not think that they would have acted in this way if they had thought that under Exhibit C they were entitled to hold all the land for the full term of ten years. We think that they took the mortgage knowing that part of the land was liable to be redeemed and that they can therefore make no claim for loss of profits because part of it was redeemed. We must, therefore, set aside the decree of the lower appellate Court and restore that of the Subordinate Judge with costs in this and in the lower appellate Court. The time for redemption is extended to this day four months.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Bhashyam Aiyangar and

Mr. Justice Moore.

Ghulam Ghouse Sha Sahib Kadiri Avergal. Appellant*
in all appeals
(Plaintiff).

v.

Venkatachalam Pillai ... Respondent
in S. A. 1266 of 1901
(Defendant).

Ghulam
Ghouse
v.

Venkata-
chalam
Pillai.

Limitation—Computation of Time—Gazetted holiday—Dies non—Suit filed on next day.

A suit filed under the Rent Recovery Act is not barred by the rule of 30 days if the last day happens to be a general public holiday and the suit is filed on the succeeding day.

Such a holiday should be regarded as a *dies non* for purposes of limitation.

Second Appeal from the decree of the District Court of Tanjore in A. S. No. 495 of 1900, presented against the decision of the Court of the Sub-Collector of Kumbakonum, dated 14th December 1899, in Summary Suit No. 515 of 1899. •

Ghulam
Ghouse
v.
Venkata-
chalam
Pillai.

C. Ramachandra Rao Saheb, V. Krishnaswami Aiyar and A. S. Balasubrahmanya Aiyar for appellants.

Plaintiff filed a suit under the Rent Recovery Act on Tuesday (29th August). 27th August, the last day allowed under the Act for filing this suit, was a Sunday. The next day *Monday* was notified as a general holiday for Srijayanti in the Tanjore District Gazette. The learned Judge holds that he did some work on that day and therefore the suit might have been filed on that day and consequently dismissed the suit. The Judge is clearly wrong. *Sambasiva v. Ramasami*¹.

Joseph Satya Nadar for respondent:—In this case the parties were Mahomedans. Srijayanti was no holiday for them. Some cases were actually heard on that day. (*Moore, J.* That does not affect the legal question at all.)

The Court delivered the following

JUDGMENT:—It is shown that the 28th August 1899 was gazetted as a general public holiday. Such being the case, it is clear that that day should have been looked on as a *dies non* for purposes of limitation and excluded from the 30 days allowed. The fact that the Sub-Collector chose to attend office on that day cannot affect the question.

We set aside the decrees of both the lower Courts and direct the Divisional Officer of Kumbakonam to retake the suits on his file and dispose of them according to law. Costs in this and the lower appellate Court will be costs in the cause. The Court-fees paid in this Court and in the lower appellate Court will be refunded.

1. I. L. R., 22 M. 179.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmaniam Aiyar and Mr. Justice Davies.

Suryanarayana and others ... Appellants*
(Plaintiffs).

v.

Venkatarama alias Kannepally Ramavadhanulu and another ... Respondents
(Defendants).

Suryanarayana v. Venkatarama. *Hindu Law—Adoption—Authority to adopt given by husband—Construction—Authority not exhausted by one adoption—Successive adoptions.*

When a Hindu gives permission to his wife to adopt and shows a general intention to be represented by an adopted son and does not indicate any particular person for adoption either by name or otherwise, nor places any restriction upon the wife's discretion :—

Held that such authority is not exhausted by one adoption, but will extend to successive adoptions to be made by the widow when the necessity arises.

*Veeraperumal Pillai v. Narrain Pillai*¹, *Lakshmbai v. Ragoji*² and *Ramasami v. Venkatarama*³ referred to.

Appeal from the decree of the District Court of Ganjam at Berhampore in O. S. No. 23 of 1899.

The authority set up in this case is only oral and the material portions of Exhibit IV referred to in their Lordships' judgment run thus :—

“ You having, in accordance with your husband's permission, adopted before, that is to say, in the year 1885, a boy named Satyasuryanarayana, the second son of Balusu Padmanabhudu, and the boy having died, as you have requested us to give permission for adoption again in order to perpetuate the family, we have approved of it and have hereby given you permission. Therefore, you should adopt any boy at any time you please and perpetuate the family.”

* 13th March 1903.

A. No. 216 of 1900.

1. 1 Strange's N. C. 78. 2. 1. L. R., 22 B, 996. 3. L. R., 6 I. A. 196.

P. S. Sivaswami Aiyar and V. Ramesam for appellants.

*Suryanara-
yana
v.*

Venkatarama.

T. V. Seshagiri Aiyar for *V. Krishnasami Aiyar*,

P. R. Sundara Aiyar and *K. Subramania Sastri* for respondents.

The Court delivered the following

ORDER:—We find no authority for the proposition of the appellants' vakil that the assent of the deceased husband's kindred required for the adoption must be the assent of the nearest sapindas. What we have to consider is whether in the circumstances of this family there was any assent of the sapindas which could be considered as sufficient. For this purpose we require to know how many sapindas there were alive at the time the authority to adopt (Exhibit IV) was executed and how many at the actual time of adoption. We also require a finding as to when the two persons who gave their written consent to the adoption in Exhibit IV died, and if the third person Ramavadhanulu who attested the deed of adoption and assented to the adoption before it took place, and if so, when. Further evidence may be taken on these points and the finding submitted in 6 weeks. Seven days will be allowed for filing objections."

[In compliance with the above order, the District Judge submitted a finding to the effect that there were 31 sapindas living at the time of execution of Exhibit IV and 34 at the time of adoption, that out of the two persons who gave their written consent to the adoption in Exhibit IV, Somayajulu died in 1893 and the other Chalamayya Sastri died in 1896, and that Ramavadhanulu who attested Exhibit IV did not assent to the adoption before it took place.]

The Court delivered the following

JUDGMENT:—The question is as to the validity of the adoption in 1898 of the 1st defendant by the 2nd defendant on behalf of her husband who died in 1861. This was a second adoption, a prior adoption having been made in 1885, but the son then adopted died shortly afterwards. Both adoptions were made on the authority of

Suryanarayana
v.
Venkatarama.

the 2nd defendant's husband, together with the assent of some of his sapindas, on each occasion.

We have no hesitation in agreeing with the District Judge in finding that the 2nd defendant's husband did authorise his wife to adopt to him. The authority as proved by the witnesses was in general terms requiring her to adopt so as to continue his line and to provide for his spiritual benefit. He did not indicate any particular person for adoption either by name or otherwise and placed no restrictions whatever on his wife's discretion.

Such being the case, the first question is whether the authority so given was exhausted by the first adoption, or whether on the death of the son then adopted, the authority of the husband survived so as to enable the widow to make the present—that is, a second—adoption.

We are not aware of any judicial decision which would bind us to hold that the husband's authority in circumstances like the present is so completely worked out by the first adoption as to prevent the widow from acting upon it when necessity arises for a fresh adoption, the estate being still vested in her, and being liable to be divested by such adoption. We are of opinion that the husband's authority held good for the second adoption also. The object and purpose of the authority given by the husband was to perpetuate his family as well as to secure his spiritual benefit, and it would be unreasonable to hold that an accident such as the early death of the boy first adopted should be allowed to frustrate the fulfilment of his object and to preclude the widow from making another adoption in the absence of any legal impediment to her doing so. When the general intention of a Hindu to be represented by an adopted son is clear, as in this case, there seems no reason why effect should not be given to such intention, if it is possible to do so without contravening the law. Each case must be decided on its own merits, without applying too strict a rule of construction in regard to powers of this description.

We are supported in our view by the decision of Sir Thomas Strange in *Veeraperumal Pillai v. Narrain Pillai*¹ where a widow

1. I. S. N. C., 78.

was held entitled to adopt a boy in furtherance of her husband's general intention in lieu of another indicated by him but who was not available; the same principle has been adopted by the Bombay High Court in *Lakshmibai v. Ragoji*¹ where the boy who was indicated for adoption not being available, the adoption of another was upheld.

Suryanara-
yana
v.
Venkatarama.

It would appear from the note 3 at page 14 of Morley's Digest that "instances have occurred in which a widow has made a second adoption on the failure of the first by death in fulfilment of a single injunction or authority from her husband, the object of such injunction being unattained unless the child lives." Another instance of the husband's general intention being acted on by the widow without disapproval even where the husband did not directly give authority for the adoption, is to be found in the case from this Presidency, *Ramasami v. Venkatarama*². So that the practice of the community has been in accordance with our view of the law.

The cases in Calcutta to which our attention has been drawn adopt what appears to us to be too artificial a rule of construction in that they practically disregard the question of intention in such cases.

We must, therefore, hold that the adoption in dispute in this case was valid, apart from the assent of the *sapindas* which was also relied on. In this view, it is not necessary for us to enter into a discussion as to the validity of that assent, but we may state that our conclusion is that that assent was not valid for several reasons, the most important of which is that it was too general in its nature "any boy at any time" and was not acted on for 9 years, during which circumstances had materially changed, one of them being that two out of three assenting *sapindas* and two dissenting *sapindas* had died in the meantime.

1. I. L. R., 22 B. 996.

2. L. R. 6 I. A., 196.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH).

Present :—Mr. Justice Subrahmaniya Aiyar, Mr. Justice Davies and Mr. Justice Boddam.

Edamanna ... Appellants* in both the
appeals (*Plaintiffs*).

Kannan Nayar and others ... Respondents in S. A.
No. 1385 of 1901
(*Defendants*).

Manyá Umma and others ... Respondents in S. A.
No. 1386 of 1901
(*Defendants 2 to 22*).

**Edamanna
v.
Kannan
Nayar.**

Transfer of Property Act, Ss. 85 and 91—Suit by one of several uralans for redemption of mortgage—Other co-uralans not asked to join.

Under Sections 85 and 91 of the Transfer of Property Act one of several uralams is entitled to bring a suit for redemption of a mortgage without being under the necessity of alleging (much less of proving) that his co-uralan was asked and refused to join in the suit.

Second appeals from the decrees of the Subordinate Judge's Court of South Malabar at Calicut in A. S. Nos. 942 and 943 of 1900 presented against the decrees of the Court of the District Munsif of Betutnad in O. S. Nos. 671 and 481 of 1899.

These second appeals coming on before *Subramania Aiyar, J.* and *Bhashyam Aiyangar, J.*, their Lordships made the following

ORDER OF REFERENCE TO A FULL BENCH.—For the reasons stated in the decision in second appeals Nos. 77 and 78 of 1901¹ for doubting the correctness of the decision of this Court in *Savitri Antharjanam v. Raman Nambudri*², we refer for the decision of a Full Bench the following question which arises in these two second appeals.

Whether one of two co-uralans without averring in the plaint that the other uralan was asked to join the former as co-plaintiff and that he refused to do so, may bring a suit to redeem a mort-

* S. A. Nos. 1385 and 1386 of 1901.

27th February 1908.

1. Since reported in I. L. R., 26 M. 46.

2. I. L. R., 24 M, 296.

gage made by the predecessors in title of the two uralans, the other uralan being made party defendant along with the mortgagees.

P. R. Sundara Aiyar and *C. V. Anantakrishna Aiyar* for appellants.

V. Ryru Nambiar and *B. Govindan Nambiar* for the respondents.

The Court expressed the following

OPINION :—We are of opinion that the answer to the question referred must be that one of two co-uralans may bring a suit to redeem a mortgage without averring or proving that the other uralan was asked to join as plaintiff in the suit.

It would be impossible to hold otherwise in the face of Ss. 91 and 85 of the Transfer of Property Act.

These sections were apparently not considered when I. L. R., 24 M. 296 was decided.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Narasimham Appellant*
(1st Defendant).

vs.

Madhavarayudu and another Respondents
(Plff. & 2nd Deft.).

Transfer of Property Act, S. 6—Hindu Law—Reversioner's interest in estate, alienability of—Spes successionis—Validity of transfer—Transfer to widow—Enlargement of estate—Surrender.

Narasimham
v.
Madhava-
rayudu.

The interest of a reversioner in an estate when the widow (limited owner) is alive is a mere expectancy or *spes successionis* and is not transferable either by way of sale, mortgage or otherwise under S. 6 of the Transfer of Property Act.

*Bahadur Singh v. Mohar Singh*¹, referred to.

It does not make any difference as regards the invalidity of such transfers that the transfer is made by the reversioner to the widow. Such a transfer does not enlarge the widow's limited estate into an absolute estate and is not analogous to a renunciation made by the widow in favour of the presumptive heir.

Where the transfer is made after the reversion falls in such transfer is valid and operative.

* S. A. 1627 of 1901.

20th March 1903.

1. I. L. R., 24 A. 94.

Narasimham
v.
Madhava-
rayudu.

Second appeal from the decree of the District Court of Nellore in A. S. No. 203 of 1900, presented against the decree of the Court of the District Munsif of Ongole in O. S. No. 557 of 1898.

V. Krishnaswami Aiyar for appellant.

T. V. Seshagiri Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The 2nd defendant who was the presumptive reversionary heir of one Venkatrayudu on the death of the latter's widow, executed during his life-time a mortgage deed in favour of the 1st defendant in respect of a portion of Venkatrayudu's estate. This was in 1892. In 1896 the 2nd defendant purported to convey to the widow of Venkatrayudu for a consideration of Rs. 400, his interest in the whole of Venkatrayudu's estate. Some twenty days after that conveyance she made a gift of the mortgaged property and other property to the plaintiff on the footing that she became the absolute owner by reason of the 2nd defendant's conveyance to her. The 1st defendant subsequently and after the death of the widow brought a suit on the mortgage of 1892, and became the purchaser in execution of the decree and obtained delivery of the property. The plaintiff brought this suit to recover possession on the strength of the gift in his favour by the widow and his claim was allowed by the Court below.

The 1st defendant appeals, and we think that the appeal is well founded. It is now clearly established by the decision of the Privy Council in *Bahadur Singh v. Mohar Singh*¹, that the right of a presumptive reversionary heir under the Hindu Law is no more than a *spes successionis* or expectation of succeeding to the property. That being so, he is incapable under S. 6 of the Transfer of Property Act of transferring such expectancy.

The fact that the transfer was in favour of the widow then in possession cannot make any difference so as to enlarge her limited estate into an absolute estate. The Vakil for the respondent argued that the transfer is analogous to a renunciation made by a widow in favour of the presumptive reversionary heir, so as to accelerate the latter's succession, but we do not think that there is any real analogy between the two cases. The mortgage made

1. I. L. R., 24 A. 94.

by the 2nd defendant in favour of the 1st defendant will also be inoperative as a mortgage under S. 6 of the Transfer of Property Act, but the sale in execution of the decree which took place after the reversion fell in to the 2nd defendant will be operative to transfer the 2nd defendant's interest in the mortgaged property.

Narasimham
v.
Madhava-
rayudu.

No question arises in this case as between the reversioners who purported to make a transfer and the transferee, but the question is between the plaintiff claiming as the donee under the widow and the 1st defendant who purchased the right, title and interest of the 2nd defendant after the reversion fell in. As we hold that the transfer by the 2nd defendant in favour of the widow, is inoperative as a transfer, the plaintiff's suit against the 2nd defendant must fail.

We therefore allow this second appeal, set aside the decrees of the Courts below, and dismiss the plaintiff's suit with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH).

Present :—Sir Charles Arnold White, *Chief Justice*,
Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

The Darmakarta of Sri Bhaktavatsala Swami

Temple, Tinnanore ... Appellant*
(Plaintiff).

v.

T. Luchimi Doss ... Respondent
(Defendant).

Madras Rent Recovery Act (VIII of 1865), S. 1, cl. (1) and (2) and Ss. 3 and 80— The Dharma-
Madras Regulation XXVI of 1802—Holder of a Jaghir not registered—Tender of karta of
patta—Meaning of "Landholder" and "Jaghirdar"—"Proceedings" construction, &c. Bhakta-
vatsala
v.

The holder of a Jaghir is entitled to tender a patta under Madras Act VIII of 1865, or to proceed under the said Act for the recovery of rent before he is registered as a Jaghirdar under Madras Regulation XXVI of 1802.

The term "landholder" appearing in cl. (1) of the Rent Recovery Act is not confined to registered landholders.

The Dharma-
karta of
Bhakta-
vatsala
v.
Luchimi Doss.

The words "and all other registered holders of land in proprietary right" in cl. (2) cannot be taken to qualify the class of persons enumerated in clause (1).

Quære:—Whether those words have the effect of qualifying the preceding words in cl. (2).

The term "Jaghirdars" in Ss. 1 and 3 of the Act are not confined to registered Jaghirdars.

The word "Proceedings" in S. 80 of Madras Act VIII of 1865 does not include tender of patta is limited to summary proceedings for arrears of rent taken after tender of patta.

Second appeal from the decree of the District Court of Chingleput in A. S. No. 60 of 1901, confirming the decision of the Court of the Deputy Collector of Saidapet in Summary Suit No. 213 of 1900.

This second appeal coming on for hearing on the 2nd March 1903, the Court (*Subrahmaniya Aiyar, J. and Benson, J.*) made the following

ORDER OF REFERENCE TO A FULL BENCH.—This is a suit by a tenant to set aside a distraint made by the landlord (defendant) for the rent for Fusli 1309. The adoptive father of the defendant was the registered Jaghirdar and died on the 29th May 1900. The defendant tendered a pattah to the plaintiff for Fusli 1509 on the 23rd June 1900, i. e., seven days before the expiry of the Fusli. The defendant had not at that time got his name registered by the Collector in the place of his father. He got it registered on the 29th August 1900. The distraint was on the 11th September 1900. The present suit was instituted on the 8th October 1900.

One of the questions in the case is whether the defendant was entitled to tender a pattah before he was registered as Jaghirdar. In *Valarama v. Virappa*¹ it was held that a person entitled to Zamindari property could not tender a pattah unless he was the registered holder.

In *Subbu v. Vasantappan*² it was held that an Inamdar was entitled to proceed under the Rent Recovery Act VIII of 1865 even though he was not registered as Inamdar.

1. I. L. R., 5 M. 145.

2. I. L. R., 8 M. 351.

We can find no real distinction in principle between Zamindars and the other classes of landholders (including Inamdars and Jaghirdars) mentioned in paragraph 2 of section 1 of the Act in so far as their power to proceed under the Act for rents due to them is concerned.

The Dharma-
karta of
Bhakta-
vatsala.
v.
Luchimi Doss.

The decision in *Valarama v. Virappa*¹ and those² following it are, in our opinion, in direct conflict with that in *Subbu v. Vasantappan*³. The language in the latter case would seem to imply a dissent from *Valarama Virappa*¹ on the authority of the Privy Council *Vizianagaram Maharajah v. Suryanarayana*⁴.

We, therefore, refer to to the Full Bench the following questions :—

- (1) Whether the holder of a Jaghir is entitled to tender a pattah under Madras Act VIII of 1865, or to proceed under the Act for the recovery of rent before he is registered as a Jaghirdar under Regulation XXVI of 1802 ; and
- (2) Whether the word “proceedings” in S. 80 of Madras Act VIII of 1865 includes tender of pattah or is restricted to proceedings subsequent to the tender of pattah taken under the Act to enforce the terms of a tenancy. Reference may be made to *Venkateswara v. Alagoo*⁵ and *Syed Ali v. Sanyasi Rauz*⁶.

P. S. Sivaswami Aiyar for *T. Rangachariar* for appellant.

V. C. Seshachariar for respondent.

The Court expressed the following

OPINION :—(1) There is no enactment which in terms requires a “landholder” to be registered before he can exercise the powers conferred by Act VIII of 1865.

S. 1 of the Act enumerates two classes of persons who, for the purposes of the Act, are included in the term “land-holders.” The enumeration of the persons in clause 2 concludes with the

1. I. L. B., 5 M. 145.

4. I. L. R., 9 M. 307 at 316.

2. I. L. B., 15 M. 484; 22 M. 221.

5. 8 M. 1 A. 327.

3. I. L. B.; 8 M. 351.

6. 3 M. H. C. R. 5.

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words "and all other registered holders of land in proprietary right." It has been argued that these words have the effect of limiting the application of the words of clause 1 to cases where the persons therein enumerated have been registered. We do not think the section can be so construed. Assuming on the true construction of the section that the words of limitation qualify the words of clause 2, they cannot be taken to qualify the class of persons enumerated in clause 1. The word "Jaghirdars" as used in Ss. 1 and 8 of the Act is not confined to registered Jaghirdars.

We think the case *Subbu v. Vasanthappan*¹ was rightly decided, and that in principle no distinction can be drawn between Zamindars and the other landholders enumerated in clause¹, of S. 1. The principle of this decision, *viz.*, that non-registration by the Collector does not affect title was acted on by the Privy Council in the case of *Vizianagaram Maharajah v. Suryanarayana*² confirming a decision of this Court as to the validity of an alienation although unregistered which proceeded upon the same grounds as *Subbu v. Vasantappan*³.

With regard to the cases in which a different view has been taken, the courts appear either to have considered *Valarama v. Virappa*¹ a binding authority, notwithstanding the decision in *Subbu v. Vasantappan*¹, or to have distinguished the case from *Subbu v. Vasantappan*¹ on the facts.

Our answer therefore to the first question referred to us is in the affirmative.

As regards the second question we are clearly of opinion that the word "proceedings" in S. 80 of the Act of 1865 does not include tender of pattah. The "proceedings" in the section are by the express terms of the section limited to summary proceedings for arrears of rent.

1. I. L. R., 8 M. 351. 2. I. L. R., 9 M. 307. 3. I. L. R., 5 M. 145.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL*.

(From the Chief Court of Lower Burma.)

Present :—Lord Macnaghten, Lord Davey, Lord Robertson,
Sir Andrew Scoble and Sir Arthur Wilson.

Maung Po Hti

v.
Mahomed
Cassim.

Maung Po Hti Appellant*

v.

Mahomed Cassim and another Respondents.

Registration Act (III of 1877), S. 17, cl. (b)—Agreement amongst partners giving one of themselves sole right to redeem mortgaged partnership premises—Document creating right in immoveable property—Registration, necessity of—Evidence, admissibility in—Necessity of further assurance if registered.

Where a partnership agreement contained a clause that one of the partners should be solely entitled to redeem the mortgaged immoveable property belonging to the partnership, such document should be compulsorily registered under S. 17 cl. (b) as the right created by the clause is a right in immoveable property. If not registered it is inadmissible in evidence. Where it is registered, a declaration of the right by the Court after contest is sufficient and it is not necessary to make an order directing the execution of any further instrument

Herbert Cowell for appellant.

J. Lewis for respondents.

Their Lordships' Judgment was delivered by

LORD MACNAGHTEN.—Their Lordships are of opinion that the judgment of the Chief Court is perfectly right. The partnership agreement of the 25th of June 1897 is an instrument falling within S 17, clause (b) of the Indian Registration Act (No. 3 of 1877). In one of the clauses of the agreement there is a complete assurance of a right of redemption for and during a future period of limited duration. The clause declares that what, but for this stipulation, would have been the right of the three partners, shall, during that period, be the right of one of the three exerciseable by him for his own sole benefit. That right is a right in immoveable property. The agreement, therefore, ought to have been registered. Being unregistered, it is inadmissible in evidence. If the agreement had been registered, then, if the respondents had been content to abide by their bargain, no further assurance from them would have been required; if they had contested the appellant's right, a declaration by the Court of his right as expressed in the agreement would have been sufficient, and it would not have been necessary for the Court to make an order directing the execution of any further instrument.

* 24th June 1903.

Maung Po Hti Their Lordships will therefore humbly advise His Majesty
 v.
Mahomed that this appeal ought to be dismissed. The appellant must pay
Cassim. the costs of the appeal.

Messrs. Richardson & Co. for the appellant.

Messrs. A. H. Arnould & Son for the respondents.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL*.

Present :—Lord Macnaghten, Lord Lindley, Sir A. Scoble,
 Sir A. Wilson and Sir John Bonser.

(From The Allahabad High Court.)

Sheo Shankar Lal and another *Appellants.*

v.

Debi Sahai *Respondent.*

Sheo Shankar Lal *Hindu law—Benares School—Stridhan—Succession—Stridhan inherited by a woman—*
 v.
 Nature of estate—Devolution—Preference of daughter's son to daughter's daughter.

Debi Sahai. Property inherited by a woman from a male is not her absolute property and passes on her death not to her *Stridhan* heirs but to the heirs of the person from whom she inherited it.

According to the Bengal School it is well settled that property inherited by a woman from a woman does not on the death of the latter pass as her *Stridhan*.

What has once descended as *Stridhan* does not so descend again.

According to the Mayukha what has passed by inheritance from a woman to a woman goes on the death of the latter to a special line of heirs with a preference for females, who would succeed to it if it were her *stridhan* proper.

According to the Benares Law also *Stridhanam* property inherited from a woman by a woman ceases to be *Stridhanam* and is not the absolute property of the latter.

The text of the *Mitakshara*, Ch. II S. 11, pl. 2 (last portion) not followed.

Where *Stridhanam* of a mother devolved upon her daughter the daughter's daughter is not entitled under the Benares Law in preference to the daughter's son upon the death of the daughter.

J. D. Mayne for appellant.

Their Lordships' Judgment was delivered by

SIR ARTHUR WILSON.—The property which is the subject-matter of this appeal formerly belonged to two brothers, Bhawani and Basant, and on the death of the former to the latter alone. Basant's

* 24th June 1908.

two widows succeeded him, but by arrangement amongst themselves the property was divided between them and the widows of Bhawani. Both the widows of Basant died in 1861, and the title then passed to Hanwant and Hanuman, somewhat distant cousins of Bhawani and Basant, as the nearest male heirs of Basant. Of these, Hanwant died 1865, leaving a son, Debi; and on the 8th September 1866, Hanuman and Debi executed a deed of gift by which they gave the property absolutely to Jadonath, the daughter of Bhawani by his elder widow, who was then living. Dilla, the younger widow of Bhawani, was likewise alive, and claimed rights in the property or part of it. There were also male relatives who claimed to be nearer heirs than Hanwant and Hanuman. Much litigation naturally ensued, but it is not now necessary to trace its course. Jadonath died in 1879, and her daughter Jagernath succeeded to her rights. Jagernath died in 1896, leaving sons, the present plaintiffs, and a married daughter.

Sheo Shankar
Lal
v.
Debi Sahai.

The plaintiffs brought the present suit in the Court of the Subordinate Judge of Gorakhpur, claiming to have become entitled to the property in dispute on the death of their mother in 1896. The defendant, who is a brother of Dilla, the younger widow of Bhawani, acquired whatever rights he ever had by virtue of a transfer to him from Dilla; and as she died in 1895, any right of his then came to an end. Apart, however, from any right in himself, the defendant was entitled to rely upon any defect he could find in the plaintiffs' title. Many issues were raised, all of which were disposed of in India in such a manner as to entitle the plaintiffs to succeed, except one upon which the High Court dismissed their suit.

The point referred to is this. The defendant raised the objection that, as a sister of the plaintiffs was in existence, she, not they, was the heir of their mother's property. The plaintiffs met this by saying that "the plaintiffs do not deny the existence of a married sister, but her existence does not prejudice their claims." On this admission an issue, which was wholly one of law, was raised, "whether the plaintiffs are entitled to maintain the present suit while the daughter of Jagernath Kunwari exists." Upon this issue

Sheo Shankar Lal v. Dobi Sahai. the Courts have differed, the Judge of First Instance having decided it in the plaintiffs' favour and given them a decree, while the High Court on appeal took a different view of the law, and dismissed the suit. Against that dismissal the present appeal has been brought.

It is clear upon the above statement that Jadonath acquired the property by gift, and that on her death her daughter Jager-nath succeeded to it by inheritance. The precise question therefore arising for decision is whether, under the Hindu law of the Benares School, property which a woman has taken by inheritance from a female is her *stridhan* in such a sense that on her death it passes to her *stridhan* heirs in the female line to the exclusion of males.

Their Lordships regret that they are called upon to decide this question upon an appeal heard *ex parte*. But Mr. Mayne, in his able and exhaustive argument, for which their Lordships are much indebted to him, called their attention to the authorities and arguments bearing upon the matter, upon one side and the other, so fully as greatly to relieve their Lordships from the difficulty which they would otherwise have felt. And since that argument they have had an opportunity of considering the judgment of the Judicial Commissioners of Oudh upon a very similar question, in a case in which judgment is about to be delivered. It is, however, to be regretted that the question has to be decided in a suit to which the plaintiffs' sister, in whom the preferable right is alleged to exist, is no party.

During the voluminous discussions, ancient and modern, which have arisen with regard to the separate property of woman under Hindu law, its qualities, its kinds, and its lines of descent, the question has constantly been found in the forefront, what is *stridhan*? The Bengal School of lawyers have always limited the use of the term narrowly, applying it exclusively, or nearly exclusively, to the kinds of woman's property enumerated in the primitive sacred texts. The author of the *Mitakshara* and some other authors seem to apply the term broadly to every kind of property which a woman can possess, from whatever source it may

be derived. Their Lordships do not propose to dwell upon this particular question. It may perhaps be regarded as one mainly of phraseology, not necessarily involving, however it be answered, much distinction in the substance of the law; for most of the old commentators recognise with regard to the property of a woman, whether called *stridhan* or by any other name, that there may be room for differences in its line of descent according to the mode of its acquisition.

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The question of substance is how the property descends in a case like the present. As to this the decision of the High Court was based upon the text of the Mitakshara, which seems to make all property taken by a woman by inheritance her *stridhan* with all the incidents which belong to that kind of absolute property, and to make it descend as such, primarily to females, and in the special line prescribed for *stridhan* strictly so-called.

It cannot now be contended that the rule thus derived from the Mitakshara is law as to inherited property generally. The cases of *Thakoor Deyhee v. Rai Baluk Ram*¹, *Bhugwandeem Doobey v. Myna Buee*² and *Chotay Lall v. Chunno Lall*³, all of them Benares cases, as well as *Muttu Vaduganadha Tevar v. Dorasinga Tevar*⁴, and *Raja Chelikani Venkayya nmu Garu v. Raja Chelikani Venkataramanuyyamma*⁵, place it beyond doubt that property inherited by a woman from a male is not her absolute property, and passes on her death not to her *stridhan* heirs, but to the heirs of the male person from whom she inherited it.

As to the descent of property inherited by a female from a female, there has not been any such conclusive ruling of this Committee. There has been, however, a remarkable concurrence of opinion in India among Judges, text writers, and pure scholars, to the effect that no distinction can be drawn, consistently with the text of the Mitakshara, between what has been inherited from a male and what has been inherited from a female;

1. 11 M. I. A. 139 (1866).
2. 11 M. I. A. 487 (1867).
3. L. R. 6 I. A. 15 : s. c. I. L. R., 4 C. 744.
4. 8 I. A. 99 : s. c. I. L. R. 3 M. 290 (1881).
5. I. L. R., 25 M. 678 : s. c. 29 I. A. 156 (1902).

Sheo Shankar Lal v. Debi Sahai. a suggestion to the contrary made by Mr. Mayne has not been received with favour. On this point it is sufficient to refer to the judgments of West, J., in *Vijiarangam v. Lukshuman*¹, Telang, J., in *Manilal v. Bai Rewa*² and Best and Ayyar, JJ., in *Virasangappa v. Ruddrappa*³; Banerjee's Tagore Lectures, 1878, p. 286; West and Buhler, 3rd Ed., p. 272; Jolly's Tagore Lectures, 1883, p. 243.

In Bengal it is well settled law that property inherited from a woman by a woman does not, on the death of the latter, pass as her *stridhan*. The rule has often been expressed by saying that what has once descended as *stridham* does not so descend again. The authorities have been collected and reviewed in *Huri Doyal Singh Sarmana v. Grish Chunder Mukerjee*⁴.

In Madras, where the Mitakshara is approved, but also other treatises (especially the Smriti Chandrika, which differs much from the text of the Mitakshara with regard to woman's property) the view has been accepted that what a woman has inherited from a woman is not *stridhan* for the purposes of inheritance: *Venkataramakrishna Rau v. Bhujanga Rau*⁵, *Virasangappa Shetti v. Ruddrappa Shetti*⁶.

With regard to Bombay, wherever the Mayukha is accepted it is held that its rules govern the descent of woman's property. And those rules differ widely from the text of the Mitakshara, and exclude the idea that what has passed by inheritance from a woman to a woman goes on the death of the latter to the special lines of heirs, with a preference for females, who would succeed to it if it were her *stridhan* proper: *Vijiarangam v. Lukshuman*⁷, *Bai Narmada v. Bhagwantrao*⁷, *Manilal v. Bai Rewa*⁸.

Under the Benares law their Lordships are not aware of any direct judicial decision on the precise question now to be disposed

1. 8 B. H. C. (O. J.) at p. 272 (1871).

2. I. L. R., 17 B. 758 at p. 761 (1892).

3. I. L. R., 19 M. 110 (1895).

4. I. L. R., 17 C. 911 at p. 916 (1890).

5. I. L. R., 19 M. 107 (1895).

6. 8 B. H. C. (O. T.) 244 at p. 260 (1871).

7. I. L. R., 17 B. 758 (1892).

8. I. L. R., 12 B. 505 (1888).

of. But they do not feel any hesitation as to the answer which ought to be given to it. On the one hand stands the text of the Mitakshara, which taken literally seems to make all property inherited by a woman a part of her *stridhan*, inheritable from her according to the rules applicable to her *stridhan* in the strictest sense of the term. On the other hand it has already been decided that the rule seemingly laid down in the Mitakshara as to the descent of property taken by inheritance is not the Benares law so far as concerns property inherited from males. The decisions to that effect were based upon no narrow grounds. Their Lordships examined the primitive texts upon which the Mitakshara purports to be based ; they considered the fundamental principles of the Hindu law ; they reviewed the judicial decisions bearing upon the questions before them ; they gave such weight as could properly be given to the very conflicting opinions of numerous pundits, and they arrived at their conclusions without hesitation. And it is difficult to see how any other rule can be applied to what has been inherited from females. Reference has already been made to the striking concurrence of opinion in India against the admissibility of any distinction between the two cases.

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What authority there is, bearing directly upon the question, points in the same direction. Macnaghten in his *Hindu Law*, Vol. I, p. 38, applies the rule that what has once passed by inheritance as *stridhan* does not so pass a second time, to the Mitakshara law as well as to that of Bengal. And as his work was based upon an exhaustive examination of the cases which had actually come before the Courts in Bengal and of the opinions of pundits given with reference to those cases, it is valuable evidence of the law as it was actually understood and applied at the time to which it relates. Moreover, the Mitakshara law with which he was brought into contact was necessarily that of the Northern schools. In *Chotay Lal v. Chunno Lal* (the Benares case subsequently affirmed by this Committee in 6 I. A. 15), *Pontifex, J.*, stated the law in the same way.

Their Lordships are, therefore, unable to agree with the High Court in thinking that the property now in question was the *stridhan* of Jagernath devolving as such upon the Plaintiffs'

Sheo Shankar Lal v. Debi Sahai. married sister in preference to them. And this is sufficient to dispose of the present case.

Their Lordships will humbly advise His Majesty that the decree of the High Court be set aside with costs, and that of the Subordinate Judge affirmed.

The respondent will pay the costs of the appeal.

PRIVY COUNCIL*.

(From the Court of the Judicial Commissioner of Oudh.)

Present :—Lord Macnaghten, Lord Lindley, Sir Andrew Scoble, and Sir Arthur Wilson.

Sheo Pertab Bahadur Singh

v.

The Allahabad Bank, Limited, and another.

Sheo Pertab Bahadur Singh v. The Allahabad Bank Limited. *Hindu Law—Stridhan—Property inherited by a woman from a woman—Qualified estate Oudh Estates Act, Ss. 2, 10 and 11.*

A person who has a limited estate in property subject to the Oudh Estates Act, 1869, has not by virtue of any provisions in the Act any absolute power to alienate the whole estate.

The Legislature must have used clear language if it intended to depart from the ordinary principles of law by empowering people to alienate what may not belong to them.

Courts may go behind the Act to the extent of recognizing trusts and giving effect to beneficial titles distinct from the statutory title under the Act.

A daughter who has succeeded to her mother's stridhan does not possess an absolute estate and a mortgage executed by her is not valid beyond her life-time.

A passage in the judgment of the Privy Council in *Jagdish Bahadur v. Sheo Pertab Singh* (28 I. A.) 100 at p. 106 explained.

J. D. Mayne and Couch for the appellant.

De. Gruyther for the respondents.

THEIR LORDSHIPS' JUDGMENT was delivered by

SIR ARTHUR WILSON.—On the 14th November, 1881, Janki Koer, a Hindu lady governed by the Hindu law of the Benares School, executed a mortgage deed in favour of the present respondents, the Allahabad Bank, by which she purported to charge, first, her zemindari Pawansi, and, secondly, in case Pawansi should be insufficient, another property, to secure the repayment by instalments of a sum advanced by the Bank, with interest.

Janki Koer having died in the meantime, the Bank on the 19th February 1894, filed a suit in the Court of the Subordinate Judge of Pertabgarh to enforce the mortgage deed. A number of persons were made defendants to the suit, but of these it is only necessary now to mention the first defendant, the present appellant, Sheo Pertab Bahadur Singh, who had succeeded to the zemindari of Pawansi on the death of Janki Koer, and who is now in possession of it. The plaint alleged that he was the heir of Janki Koer. The present Appellant in his written statement said that Janki Koer held Pawansi as a Hindu daughter, without power of alienation, that he himself was not Janki's representative, and that no transfer by her could affect him. Issues were settled of which it is sufficient to mention the 6th: "Was Rani Janki Koer competent to mortgage taluqa Pawansi in such a way as to make it binding beyond her lifetime?"

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The history of Pawansi, so far as it is necessary to notice it, is this. At the time of the annexation of Oudh, in which it lies, Kablas Koer, the mother of Janki, was in possession of it. The summary settlement was made with her, a sanad was granted to her, and she was entered in lists 1 and 2 under sec. 8 of the Oudh Estates Act, 1869 (Act I of 1869). After her death in August 1872 disputes arose as to the succession to her property, and litigation ensued, which ended in a judgment of this Committee, by which it was decided that Kablas Koer had taken a permanent heritable and transferable right in Pawansi, and that on her death it had passed to her daughter and child Janki: *Brij Indar Bahadur Singh v. Ranee Janki Koer*¹.

After the death of Janki Koer, controversy again arose as to the succession, and again the litigation was carried to this Committee: *Jagdish Bahadur v. Sheo Partab Singh*². In that litigation no one claimed to be entitled as *stridhan* heir of Janki. The suit was framed upon the assumption that upon the death of Janki the property did not pass to any heir of hers, but reverted to the heirs of an earlier generation. In the judgment it is said (at p. 106):—"It is not disputed that the succession must be to the heirs of her (Janki's) father," presumably as the *stridhan* heirs of her mother in the absence of lineal heirs of the latter.

1. 5 I. A. 1 (1877).

2. I. L. R. 23 A. 369 : 28 I. A. 100.

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The question then which their Lordships have to decide is, whether Janki Koer had power to mortgage Pawansi absolutely, or whether her power to do so was limited to her own lifetime ?

The case for the plaintiff Bank was put upon two grounds :— First, that under the Oudh Estates Act of 1869 Janki Koer, as heir of a taluqdar or grantee, had express statutory power to alienate the whole estate, whatever the extent of her own interest might be ; secondly, that apart from the Act, under the Hindu law of the Benares School, she having inherited what had been her mother's *stridhan*, held it as her own *stridhan* with full power of alienation. The Subordinate Judge decided in favour of the plaintiff Bank, the now respondent. upon both grounds, and made a decree in his favour. The Judicial Commissioners on appeal expressed no opinion upon the first question, but on the second question agreed with the First Court and affirmed its decree. Against his decision the present appellant alone has appealed, and the appeal, therefore, relates only to Pawansi.

With regard to the first question, there can be no doubt that Kablas Koer, the mother of Janki, was a taluqdar or grantee under Act I of 1869, and the portions of the Act material to the present question are :—

“Sec. 2.—‘Estate’ means the taluqa or immoveable property acquired or held by a taluqdar or grantee. . . .

“Heir, means a person who inherits property otherwise than as a widow under the special provisions of this Act.

“Sec. 11.—Subject to the provisions of this Act and to all the conditions under which the estate was conferred by the British Government, every taluqdar and grantee, and every heir and legatee of a taluqdar and grantee, of sound mind and not a minor, shall be competent to transfer the whole or any portion of his estate, or of his right and interest therein, during his lifetime, by sale, exchange, mortgage, lease, or gift and to bequeath by his will to any person the whole or any portion of such estate, right, and interest.”

The contention was that every heir, whether absolute or qualified, of a taluqdar or grantee (and it would seem to follow, every legatee, however limited his interest) has an absolute power

to alienate the whole estate. If sec. 11 had stood alone, the question would hardly have been arguable. A power to an heir to alienate "his estate or his right and interest therein" would certainly have meant his estate, if he owned the estate, or his right and interest therein, if he owned less than the estate. But the argument was based upon the words "otherwise than as a widow" in the definition of an heir. It was argued that the insertion of these words indicated an intention to give to all heirs other than widows some power which widows do not possess. It is useless to speculate why the words referred to were inserted in the definition; but their Lordships think that much clearer language would have to be shown to justify them in saying that the Legislature has departed so far from the ordinary principles of law as to empower people to alienate what may not belong to them. And the decisions of this Committee in former cases seem to lend support to this rather than to the contrary view. In a series of cases it has been held that, notwithstanding the strong language of the Act, and in particular the enactment in sec. 10 that the Courts are to accept the lists framed under the Act as conclusive that the persons included in them are taluqdars or grantees, and those of sec. 11, the Courts may nevertheless go behind the Act to the extent at least of recognising trusts, and may give effect to beneficial titles distinct from the statutory title under the Act. It may be sufficient to refer to *Hurpurshad v. Sheo Dyal*¹, and *Seth Jaidial v. Seth Sitaram*². From what was said in the last-mentioned case (at p. 228) it would appear that, if the facts had been such as to require it, their Lordships would have granted an injunction restraining a taluqdar recorded as such under the Act from attempting to alienate the estate to the detriment of those beneficially interested.

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The question which remains is whether, apart from the provisions of the Act, Janki, being governed by the Hindu law of the Benares School, had power to alienate absolutely the taluqa of Pawansi which she had inherited from her mother. The question thus arising is not the same question as that with which their Lordships had to deal in the case of *Sheo Shankar Lal v. Debi Sahai*³, in which judgment has just been delivered, but it is very closely connected with it. Each case has to do with the estate

1. 3 I. A. 259 (1876).

2. 8 I. A. 215 (1881).

3. *Ante* p. 330.

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of a woman under Benares law in property inherited from a woman. The former case referred to the descent of such property ; the present raises the question whether it is the absolute property of the last holder in such a sense that, apart from any grounds of necessity, she could alienate it beyond her lifetime.

In the present case their Lordships have had the advantage of hearing a full argument upon both sides. The argument for the appellant was to the effect that the alleged power of the lady to alienate in the present case could be based only upon the literal interpretation of the Mitakshara, which seems to make all property inherited by a woman her *stridhan* in the strict sense of the term with all the incidents of such property, including the free power of alienation ; that that view of the Benares law had already been negatived by this Committee in the case of property inherited from a male that inheritance from males and that from females could not be differently treated ; and that the authorities in most parts of India were to the effect that what a woman has inherited from a woman she does not hold as her absolute and alienable estate, but for a qualified estate, with reverter after her death to the heirs of her predecessor in title. The argument on the other side was based strictly upon the text of the Mitakshara ; but it was contended that a distinction should properly be drawn between property inherited from males and that inherited from females, and an endeavour was made to show that the decisions in various provinces in India applying the doctrine of reverter to such cases were wrong.

On the present point, as on that arising in the previous case, it is too late to contend for the literal meaning of the Mitakshara to the full extent. The previous decisions of this Committee have established that, under the Benares law, what a woman takes by inheritance from a male she takes not absolutely, but for a qualified estate alienable only under the conditions applicable to such an estate.

The reasons given by their Lordships in the judgment just delivered for declining to draw a distinction between property inherited from a male and that inherited from a female seem to them to apply to the present case. As to the argument directed against

the application of the doctrine of reverter in such cases as the present, their Lordships are of opinion that that doctrine is too well established in India generally to be now overthrown. The question may be different in those parts of Bombay which are governed by the Mayukha. An exact examination of the terms of that treatise seems to have led to some diversities of view in the Bombay High Court, which need not now be considered.

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Their Lordships will humbly advise His Majesty that the decree of the Subordinate Judge and that of the Judicial Commissioners ought to be set aside so far as they affect the property of the present appellant, and that instead thereof the suit ought to that extent to be dismissed with costs in both courts. The respondent Bank will pay the costs of this appeal.

Messrs. T. L. Wilson & Co. for appellant.

Messrs. Rankin, Ford & Co. for respondents

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Ramanathan Chetti ... Appellant* (*Defendant*).

v.

Murugappa Chetti ... Respondent (*Plaintiff*).

Hereditary office—Trustee of a public religious institution—Office of trustee vested in several persons—Senior and junior branch—Management by turns—Transfer by junior branch in writing registered—Absence of instrument of transfer—Secondary evidence—Junior branch excluded for over 12 years—Acquisition by prescription—Holding of members of senior branch—Adverse enjoyment—Scheme proper to be framed—Civil Procedure Code, S. 539—Management by turns of office of trustee of public institution—Proper scheme.

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Where by a document in writing four members of a junior branch transfer their right of management of a public temple to a member of the senior branch, and such document is admittedly unstamped and unregistered, in the absence of such instrument of transfer, other evidence in proof of such transfer is inadmissible.

Query :—Whether a member can rely upon such transfer as the basis of his title.

* A. No. 121 of 1901.

12th August 1903.

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*Raja Varma v. Ravi Varma*¹; *Kuppa v. Dorasami*²; *Narayana v. Runga*³; *Alappa v. Sivarama Sundara*⁴; and *Ammasami v. Ramakrishna*⁵ referred to.

Where there were two branches consisting of four members each of a branches being entitled to management in rotation or by turns of a public temple or religious institution, and the four members of the junior branch transferred their right to a turn of management to a member of the senior branch, and such member enjoyed the turns of the transferors for a period of nineteen years, he acquires a right by prescription and the right of the junior members to a turn of management is barred either under Art. 124 or 127 or 142.

Possession of office by one trustee during his turn is neither exclusive of nor adverse to the other trustees.

The acting or executive trustee for a year or period holds the office and discharges the duties thereof on behalf of all the co-trustees and not on behalf of himself alone. *Attorney-General v. Holland*⁶ referred to.

But where the members of the junior branch are excluded and their turns are exclusively taken by a member of the senior branch, the enjoyment by the other members of the senior branch with knowledge that the junior branch is excluded is not for the benefit of such junior branch and each member of the senior branch holds the office during his turn on behalf of himself and the other members of the senior branch and to the exclusion of the junior branch.

Where under such circumstances the office of trustee and the properties of the temple have been, for more than 12 years, held and possessed by the members of the senior branch as a whole body, such possession is adverse to the members of the junior branch as a body and the rights of the latter will be, by the operation of S. 28, extinguished.

Where several trustees enjoy the office by turns for a long time, a right to manage by turns is not acquired by them merely by the operation of limitation.

*Venayak v. Gopal*⁷ referred to.

It is competent for co-trustees of a public religious institution to settle by arrangement among themselves a scheme of management by each of the co-trustees in rotation whether emoluments are attached to the office or not. Such a scheme ought to be upheld as being an equitable and proper arrangement by a court acting under S. 539, C. P. C.

But such a scheme is only subsidiary to the interest of the institution, and the arrangement for such a scheme may be set aside when it is injurious to the interests of the trust or institution.

1. I. L. R., 1 M. 235.

2. I. L. R., 6 M. 76.

3. I. L. R., 15 M. 183.

4. I. L. R., 19 M. 211.

5. I. L. R., 24, M. at p. 200.

6. 47 R. R., 476.

7. I. L. R., 27 B. at p. 357.

Appeal from the decree of the Subordinate Court of Madura (East) in O. S. No. 52 of 1900.

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V. Krishnasami Aiyar, P. R. Sundara Aiyar and C. V. Anantakrishna Aiyar for appellant.

M. A. Tirunarayanachariar and P. S. Sivaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT :—This is an appeal against the decree of the Subordinate Judge of Madura (East) in a suit which was brought by the respondent to enforce his turn of management, of the plaint temple and its endowments, for a period of 3 years commencing from the 15th July 1899.

It is admitted that the plaint temple (with its endowments) is a public religious institution, that the trusteeship thereof is hereditary in the family of the parties to the suit, but that the family has no beneficial interest in the property or income of the temple. Mayandi Chetti, the grandfather of the respondent and the great-grandfather of the appellant, was the last sole trustee, and on his death, the office devolved by inheritance on his male descendants by his two wives. Four of them were his grandsons or great-grandsons through his first wife, and the other four grandsons or great-grandsons through the second (see paragraph 7 of the Judgment of the Subordinate Judge). Under the notion apparently, that Mayandi's property devolved in equal undivided moieties (1 Strange's Hindu Law p. 205) upon the respective descendants by his two wives, the management of the temple was until about 1881-82, conducted by these in rotation, each for one year.

We agree with the Subordinate Judge that the management was taken alternately by one member of each branch and not,—as falsely asserted by the appellant,—by the members of the senior branch consecutively for four years and then by the members of the junior branch likewise for four years. We also agree with the Subordinate Judge that since 1881-82 (in which year the management was in the hands of a member of the junior branch) the respondent has been managing the temple not only during the years

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of his own turn, but also during the years of the turns of the members of the junior branch. We are, however, unable to agree with the Subordinate Judge that the appellant, at the end (in July 1899) of the year of his turn transferred possession of the villages to the respondent, that the respondent was thereafter dispossessed and that he is on that ground entitled to the decree sought for.

The respondent's claim is clearly stated in paragraphs 3 and 4 of the plaint. In paragraph 3 it is stated that it has been arranged that during every term of 8 years of management, the management was to be by the four members of the senior branch, the respondent having his turns in the 2nd, 4th, 5th, 6th and 8th years, the appellant in the 3rd year and the other two members in the 1st and 7th years respectively. The appellant has thus had full opportunity to disprove this arrangement or establish why the same is not binding upon him or should be discontinued. In paragraph 4 of the plaint, it is further stated that the four members of the junior branch (whose turns of management would come in the 2nd, 4th, 6th and 8th years) transferred their turns to the respondent, and "that he has been enjoying the same for about 19 years without any objection and with full right."

The appellant's pleader, in support of the appeal, chiefly urges (1) that the evidence adduced in proof of the transfer is legally inadmissible, inasmuch as the alleged transfer was by an unstamped instrument (which is said to have been lost), (ii) that such transfer, even if proved, is invalid in law, (iii) that the right of the members of the junior branch, as co-trustees, has not been extinguished by the law of limitation, and (iv) that even if their right had been extinguished, the respondent could not as against the appellant acquire a right, under the law of limitation, to the additional number of turns of management claimed by him.

If the respondent's title in the suit rested merely on the transfer made to him by the four members of the junior branch (who were co-trustees with him and the other members of the senior branch), it must be admitted that in the absence of the alleged instrument of transfer—which was admittedly unstamped and unregistered,—other evidence in proof of such transfer is inadmissible. It therefore becomes unnecessary to consider and

decide whether such relinquishment, if proved, can be relied upon by the respondent as the basis of his title, having regard to the ruling of the Privy Council in *Raja Vurmah v. Ravi Vuarmah*¹ and the decisions of this court in *Kuppa v. Dorasami*², *Narayana v. Ranga*³, *Alagappa Mudaliar v. Sivarama Sundara Mudaliar*⁴ and *Annasami Pillai v. Ramakrishna Mudaliar*⁵.

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On the question of limitation, we are clearly of opinion that the right of the members of the junior branch, as co-trustees, has been extinguished, whether the appropriate article applicable to the case be article 127 or 142 or, as contended by the appellant's pleader article 124. The evidence establishes beyond all doubt that the members of the junior branch had since May 1882, discontinued possession of the immoveable properties belonging to the temple, as also performance of the duties usually appertaining to the office of trustee (of the temple) and that the members of the senior branch have been in turns successively in possession of the properties of the temple and performed the duties of the office of trustees to the exclusion of and adversely to the members of the junior branch. Two of the members of the junior branch—who as witnesses now support the appellant—admit that an abortive attempt was made 'about 8 years ago' (about 1892) to regain possession of the office, and in fact falsely depose that they did regain possession for a short period of 3 months. Bearing in mind that the discontinuance of possession on the part of the members of the junior branch was in consequence of their having relinquished their rights in favour of the respondent (as is now clearly admitted by one of the members of the junior branch as the plaintiff's 1st witness, and by the appellant himself in two former depositions of his, Exhibits QQ and RR), it is clear beyond all doubt that there has been an ouster of the members of the junior branch for about 19 years prior to the suit.

The learned pleader for the appellant argues that inasmuch as the respondent has not himself been in continuous possession for 12 years, and the possession of the appellant and of the other two members of the senior branch during the above period of 19 years,

1. I. L. R., 1 M. 235.

4. I. L. R., 19 M. 211.

2. I. L. R., 6 M. 76.

5. I. L. R., 24 M. 230.

3. I. L. R., 15 M. 183.

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was not adverse to the members of the junior branch, the rights of the latter could not be barred under article 124. This argument proceeds on a misapprehension that when trust property is managed in rotation by co-trustees, the possession of the office by each, during his turn, is exclusive of or adverse to the other co-trustees. Though each of the co-trustees may, during his turn in the rotation, be regarded in a sense as the 'acting' or executive trustee for the year or period (Cf. *Attorney-General v. Holland*,¹) yet he holds the office and discharges the duties thereof on behalf of all the co-trustees and not on behalf of himself alone. In fact, as a general rule, even during the turn of each co-trustee, all the co-trustees are entitled, and, in fact, are bound, to act jointly in matters other than the ordinary routine duties. The supposed relinquishment, by the junior branch, in favour of the respondent whether the same be valid or not in law was one that was made to the knowledge of the appellant (see Exhibits QQ and RR) and the other members of the senior branch and was so acted upon since 1882, the respondent taking the turns of management of the junior branch also. Each of the members of the senior branch must, under these circumstances, be taken in law to have held and discharged the duties of the office, on behalf of himself and the other members of the senior branch, to the exclusion of the junior branch. In this view, the office of trustee and the properties of the temple have been, for more than 12 years, held and possessed by the members of the senior branch, as a whole body, adversely to the members of the junior branch, as a body, and the rights of the latter have been, by the operation of section 28 of the Limitation Act, extinguished (*Alagirisami Naicker v. Sundareswara Ayyar*²) not in favour of the respondent individually but in favour of the members of the senior branch, as a body. The appellant, therefore, cannot plead, in bar of the respondent's claim that the junior branch or rather, one of its members, and not the respondent, is entitled to succeed him in the turn of management.

The only question that remains to be considered is whether the respondent can enforce, as against the appellant, his turns of management according to the rotation which has been in force since 1882. Having regard to the nature of the right of management by

1 47 R. R., 476.

2 I. L. R., 21 M. 278.

rotation by each of several co-trustees (as explained above), such right cannot, as between themselves, be acquired merely by the operation of the law of Limitation (see dictum of the High Court of Bombay, quoted on appeal, with approval by the Privy Council in *Vinayak v. Gopal*¹).

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But in our opinion, the respondent is clearly entitled to the relief sought for, upon the basis of his title as disclosed in paragraph 3 of his plaint, and we cannot accede to the contention of the appellant, that according to the true construction of the plaint, the respondent's cause of action is based only on the relinquishment made in his favour by the members of the junior branch and the validity thereof and that no relief should be given to him in this suit on the footing of the scheme of management set forth in paragraph 3 of the plaint. We are clearly of opinion that the decree appealed against should be upheld as the appellant has failed to show any valid ground for discontinuance or supersession of that scheme. No court, in the exercise of its equitable jurisdiction under section 539, Civil Procedure Code, or otherwise, will be disposed to revise and alter such scheme unless it is satisfied that in the interests of the institution and the more effective management of its affairs such revision is needed.

In paragraph 6 of his written statement, the appellant admits that it was originally arranged that each one of the co-trustees should manage the affairs of the temple for one year, (in rotation) on his own behalf, and as agent of the others, but pleads in paragraph 7 that such arrangement is revocable at the instance of any of the trustees. This plea is clearly unsustainable and no authority has been cited in support of such proposition. A scheme of management which has been framed and acted upon by the trustees, cannot be revoked at the will and pleasure of any of them. It is next urged that the practice which has been in force since 1882, cannot be regarded as a scheme consented to by the four co-trustees of the senior branch. Such practice was certainly a deviation from the original arrangement (admitted by both parties) according to which the management was to be held in turns by all the eight members (in both the branches) and though there is no proof

1. I. L. R., 27 B. 353.

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of any express agreement entered into between the four members of the senior branch to alter the original scheme of management, yet according to the principle clearly enunciated by S. 252 of the Indian Contract Act, such agreement and consent thereto (between the members of the senior branch) must be implied from the uniform course of dealings and practice extending over a period of 19 years.

It may be that this revised scheme of management was the result of a *bona fide* belief, on the part of all the members of both the branches, that the members of the junior branch had validly relinquished their rights in favour of the respondent and that he should therefore take their turns. Even if such relinquishment be not valid in law to vest by its own force in the respondent their turns of management, that can be no ground for holding that a scheme of management which has been in force since such relinquishment can be revoked at the will and pleasure of any of the trustees. It may be added, that in no case has it ever been held that, where the office of trustee is hereditary in a family and one of the members, for no valuable consideration, renounces his right in favour of one or some of his co-trustees, with the knowledge and consent of the others, such relinquishment is illegal or invalid.

The contention that it is not competent for co-trustees to settle a scheme of management by each of the co-trustees in rotation in cases, at any rate, in which no emoluments are attached to the hereditary office of trustee cannot be upheld. In the case of hereditary offices in this country, the number of co-trustees, is in the very nature of things liable to increase and the co-trustees may belong to various branches of the family. The office may or may not have emoluments attached thereto. In the former case the emoluments will be subject to 'partition' in the strict sense of the term like any other family property. But whatever may be the number of co-trustees, the office is a joint one and the co-trustees "all form, as it were, but one collective trustee and therefore must execute the duties of the office in their joint capacity" (Lewin on Trusts, 8th Edition 258, Perry on Trusts, paragraph 411) and so long as the duties of the office are thus discharged, and one of them is not the managing member of the undivided family in which the office is held

tary, each of them is entitled and bound to participate equally with the others in the management of the trust, though it may be that if the subject-matter of the trust had been ordinary partible property (and not trust property) the shares of the co-trustees who form the members of the family would be unequal. When by reason of the family becoming divided, the eldest member ceases to be the managing member of the family, it becomes highly inconvenient and also detrimental to the interest of the religious institution, if one and all the members (as co-trustees) are to participate in the joint discharge of the duties of the office. Further, though the office is in its nature indivisible, yet it being hereditary in the family, the family when it becomes divided regards each member of it as having the same share or degree of interest in the office as in other joint family property which is legally partible. Except in the few cases in which the hereditary office may be descendible only to a single heir, the usage and custom generally is that along with other properties the office also is divided in the sense that the office is agreed to be held and the duties thereof discharged in rotation by each member or branch of the family, the duration of their turns being in proportion to their shares in the family property. Such a scheme of management may proceed either on the footing that the co-trustees are to continue as undivided members to guard the trust-property or on the footing of being divided members as in the case of the rest of the family property. In either case as between themselves their position will be that of co-trustees, though on the death of any of them the devolution of his interest in the office will vary according as the scheme of management has been settled on the one footing or the other. Even in cases in which recourse is had to a suit for the partition of the family property, the courts give effect to the usage and custom above referred to, by providing in the decree for management of religious and charitable institutions by different members or branches of the family in rotation, on the above principle (See Mayne's Hindu law, 6th edition, paragraphs 439 and 468; 2 Morley's Digest 146; see also *Anandmoyee Chowdhraie v. Boykantath Roy*¹ 193; *Ram Soondur Thakoor v. Tarukchunder Turko-uttun*²). Such usage and custom is not restricted as

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1. 8 W. R. 193.

2. 19 W. R. 28.

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apparently held in *Sri Raman Lalji v. Sri Gopal Lalji*¹ to cases in which there are emoluments attached to the office, but extends as well to cases like the present in which the trustees have no beneficial interest. The usage is as wholesome in the one case as in the other, for the efficient and smooth discharge of the duties of the office which being hereditary in the family devolves on all the members thereof as co-trustees however numerous they may be.

The view taken by the learned Judges of the Allahabad High Court in *Sri Raman Lalji v. Sri Gopal Lalji*¹ that one of several co-trustees is "not entitled to ask a court to partition the duties of the trust between himself and his co-trustees so as to give him the exclusive possession and management of the trust property for (say) six months in the year, putting the other trustees entirely aside during his period of management" and that trusteeship is not "personal property" liable to partition, is one to which no exception can be taken. But, as already pointed out, an arrangement by which the several co-trustees are to discharge their duties in rotation, each for a certain period, is not even during the period of management by each in rotation, a management and possession of the trust property (by such co-trustee) to the exclusion of and adversely to the other co-trustees. It could hardly be denied that the author of a trust who appoints several co-trustees might (as in *Attorney-General v. Holland*² already referred to) provide that each trustee in rotation should be the acting trustee for a year, and that it would be competent for a court, in the exercise of its equitable jurisdiction to settle a scheme for the management of a public, religious or charitable trust by the various co-trustees in rotation, if such management would be more beneficial to the interests of the trust than the joint and concurrent management thereof by a large number of co-trustees. If so, it is difficult to see on what principle it could be held that it is not competent to the co-trustees themselves to settle a scheme of management by turns (cf. *Perry on Trusts*, paragraph 417) having regard to the considerations above adverted to as to the duration of the turn of each co-trustee, and that such arrangement can be terminated at the will and pleasure of any of the co-trustees. Probably the juristic basis for the usage and custom above referred to is not

1. I. L. R., 19 A. 428.

2. 47 B. R. 476.

strictly the legal right of partition of ordinary joint family property, but the equitable right to settle a suitable scheme for the efficient and satisfactory management of trusts, the duration of the turns of the several members in rotation being, however, fixed with reference to the law of partition. It is, however, to be borne in mind that the interests of the trust are paramount and the scheme of management only subsidiary and if it be shown to the satisfaction of the court that the existing scheme, however equitable it may be as to the relative distribution and apportionment of the management as between the co-trustees themselves, is injurious to the interests of the trust, the court has full power to alter the scheme both as to the duration of the turns and otherwise as to it may seem appropriate.

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The appeal fails and must be dismissed with costs save that the portion of the decree relating to the delivery of the accounts will be modified by omitting the words "Schedule C" and substituting therefor the words "of the temple in the possession or under the control of the defendant."

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmanya Aiyar, Mr. Justice Benson
and Mr. Justice Bhashyam Aiyangar.

Ramaswamy Iyah and another ... Appellants.*

v.

Kuppusawmi Iyah and others ... Respondents.

*Indian Succession Act, Ss. 96 and 128—Hindu will in town of Madras—Legacy to child
—Child appointed as executor—Death of child before testator leaving lineal descendant—Claim of child's lineal descendant to legacy.*

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S. 96 of the Indian Succession Act which is made applicable to Hindu wills in the Town of Madras, only applies to a case where a legatee predeceases the testator whether such legatee is named as executor or not.

S. 128 can only apply when the executor survives the testator.

So when a bequest is made to a child of the testator and the latter appoints such child as one of his executors and the child predeceases the testator leaving a lineal descendant, such lineal descendant of the child will be entitled under S. 96 to claim the legacy notwithstanding that his executor is not able to prove the will or otherwise act as an executor by reason of his death and S. 128 has no application.

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Iyah
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Kuppuswami
Iyah.

Appeal from the judgment of his Lordship the Chief Justice, in C. S. No. 109 of 1901 (Original Side).

The son of the testatrix who was appointed executor predeceased her leaving issue. The question was whether the legacy to the son lapsed on his death.

P. R. Sundara Aiyar for appellants :—The legacy to the son lapsed under S. 128 of the Succession Act. He was one of the executors of the will. He predeceased the testatrix and therefore did not *prove the will or otherwise manifest an intention to act under the will.* (*Subrahmania Aiyar J* :—What was the view of the Chief Justice?) His Lordship held that S. 128 was controlled by S. 96 which enacts that a legacy to a child who predeceased the testator will go to his descendants and not lapse. The English law simply raises a presumption that a gift to a person named an executor is given to him as such. But this section makes it a positive rule of law which cannot be rebutted just as a mere presumption might be (*Subrahmania Aiyar J* :—What is there to show that the section went beyond the English law?) The language is clear. It admits of no qualification. (*Subrahmania Aiyar J* :—Then you must go the length of saying that even if the testator clearly said that the gift is to the child independently of his being executor, S. 128 will create a lapse by the predecease of the child.) That is what the section says. (*Subrahmania Aiyar J* :—Is that construction correct? What do you say is the principle of S. 96? There must be some principle). The manifest justice of the rule. (*Subrahmania Aiyar, J* :—Does not justice require that S. 128 should be so read as not to affect S. 96. In fact S. 128 is a general rule, and S. 96 deals specially with children. The general rule must be read subject to the special rule). If they are inconsistent; there is no inconsistency here. S. 96 speaks in general of children. It does not contemplate the child being executor. The fact that S. 96 does not affect the legacy, does not show that it will not be affected by the other sections of the Act. (*Bhashyam Aiyangar J* :—You propose to read after the word *child* in S. 96 the words ‘who is not an executor’.) It is not necessary to do so. If S. 128 is not to apply where the executor is a child, it would have been easy to say so. (*Bhashyam Aiyangar J* :—Does the section at all apply to this case. It assumes that the executor has survived and is in a

position to prove the will or otherwise manifest an intention to act under the will.) If S. 128 assumed that the executor survived the testator, then such surviving is also a condition to be satisfied. S. 128 makes the legacy conditional on the executor accepting the executorship. If that condition necessarily involved another condition, then both conditions will have to be satisfied. This is a condition precedent which must be satisfied strictly. If the performance of the condition becomes impossible, the legacy must fail (*Subrahmaniam Aiyar, J.*—It is not a condition precedent. *Bhashyam Aiyangar, J.*—The death of the testator vests the property in the parties. The subsequent refusal to act divests the interest.) If that were so, the section will be differently worded. It does not speak of divesting under given circumstances. It says that the legacy will not vest unless he acts as such (*Bhashyam Aiyangar, J.*—The only question now is whether S. 128 will apply to the case of predecease. S. 92 provides for failure of legacy by predecease. S. 128, therefore, will not cover a case of predecease. If an executor predeceases, does a legacy to him lapse under S. 92 or S. 128 of the Act). Under both sections. (*Bhashyam Aiyangar, J.*—The application of S. 128 is limited to the case where the executor survives). There is one case in 15 Cal. 551 (*Subrahmaniam Aiyar, J.*—That does not arise here. If S. 128 applies, then the question whether it is an absolute rule will arise. That is an authority on that point. *Bhashyam Aiyangar, J.*—I would say that S. 128 is absolute and will apply only if the child survived and refused to act as executor.

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Iyah.

P. S. Sivaswami Aiyar for respondent was not called upon.

The Court delivered the following

JUDGMENT :—We concur with the learned Chief Justice in his construction of S. 96 of the Indian Succession Act. S. 128 implies that the executor survives the testator. It, therefore, cannot apply to a case where the executor predeceases the testator. That section, therefore, does not affect the case contemplated by S. 96. This latter section can only apply to a case where the legatee predeceases the testator, whether he has been named as executor or not.

We dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*,
and Mr. Justice Moore.

Ramalinga Chetty ... Appellant*
(*Plaintiff*).

v.

Fachaiappa Mudaly and others ... Respondents
(*Defendants 1 to 4*).

Ramalinga Chetty
v.
Pachaiappa Mudaly. *Civil Procedure Code, S. 317—Purchase for plaintiff—Certified purchaser admitting plaintiff's title—Defendants claiming under independent title—Suit against certified purchaser.*

Where there is no contest between the plaintiff and the certified purchaser and the defendants other than the certified purchaser claim under an independent title, S. 317 does not bar the suit of the plaintiff claiming the property on the ground that the purchase is benami for him. In such a case there is no "suit against the certified purchaser on the ground that the purchase was made on behalf of another person" within the meaning of S. 317, C. P. C.

Second appeal from the decree of the District Court of Chingleput in A. S. No. 84 of 1900, presented against the decree of the Court of the District Munsif of Conjeeveram in O. S. No. 692 of 1898.

T. V. Seshagiri Aiyar for appellant.

P. R. Sundara Aiyar for 1st respondent.

The Court delivered the following

JUDGMENT :—In our judgment the present suit is not "a suit . . . against the certified purchaser on the ground that the purchase was made on behalf of any other person" within the meaning of S. 317 of the Code of Civil Procedure. The certified purchaser is no doubt a defendant to the suit, but there is no contest between him and the plaintiff, the former has never disputed the plaintiff's title, and, in fact, at the trial of the suit he deposed that he purchased the property on behalf of the plaintiff and delivered possession thereof to the plaintiff. On this ground the case appears to be clearly distinguishable from *Viraraghava*

* S. A. No. 665 of 1901.

18th September 1902.

v. *Venkata*¹, upon which the District Judge relied. There is apparently no case in which it has been held, that from the mere fact that the certified purchaser is a defendant, there being no contest between the plaintiff and the certified purchaser, S. 317, C. P. C., is a bar to the suit against persons who, as the plaintiff alleges, are wrongfully in possession. In *Monappa v. Surappa*² the contest was between the certified purchaser and the plaintiff—the latter having been put into possession by the former, and it was held that as between the plaintiff and the certified purchaser the section was not a bar to the suit. In that case, the judges say, “It is obvious, therefore, that, when after obtaining the certificate of sale, the purchaser acknowledges that his purchase is benami and gives up possession, or does some act which unequivocally indicates an intention to waive his right, or to restore the property to the real owner, the fresh act might, by reason of the antecedent relation between the parties, operate as a valid transfer of property, the reason being that benami purchases are not made illegal, though the real purchaser is disabled from maintaining a suit against the certified purchaser at an auction sale in execution of a decree on the sole ground that he was only a benamidar.” It seems to us that this reasoning applies *a fortiori* to a case like the present where there is no contest between the plaintiff and the certified purchaser and the defendants who contest the suit set up an independent title.

Ramalinga
Chetty
v
Pachaiappa
Mudaly.

We can see nothing in the judgments of the Privy Council to which our attention has been called, which is inconsistent with our holding that the present suit is not one to which S. 317, C. P. C., applies.

The decree of the District Judge must be reversed and the appeal remanded for decision on the merits. The plaintiff will have the costs of the appeal.

1. I. L. R., 16 M. 290.

2. I. L. R., 11 M. 243.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Ramasamy Aiyar and another... Appellants* (*Defendant 1 and 5*).

v.

Thirupathi Naick ... Respondent (*Plaintiff*).

Ramasamy Aiyar v. Thirupathi Naick. *Registration Act, S. 17—Darkhast for lease—Endorsement granting application—Lease not exceeding five years nor reserving rent exceeding Rs. 50—Compulsory registration—Incidents attached by custom effect of, on registration.*

The criterion for the necessity of registration of a document is what is expressed on the face of document and not what incidents attach by custom to a transaction of the kind mentioned in the document.

Where upon a darkhast application for the grant by lease of certain lands the manager of the temple to which the lands belonged made an endorsement granting the application and the endorsement was communicated to the applicant.

- Held*—(1) that such endorsement was an agreement to lease and was subject to the provisions of the Registration Act as if it were a lease ;
- (2) that such agreement in terms not purporting to be for a period exceeding 5 years and not reserving a rent exceeding Rs. 50 per annum, did not require registration under the Registration Act ;
- (3) that the fact that by custom, if any, a lease of this kind would entitle the grantee to hold permanently did not render registration necessary.

Appeal from the order of the Subordinate Judge's Court of Madura (West) in A. S. No. 598 of 1901, presented against the decree of the Court of the District Munsif of Madura in O. S. No. 826 of 1900.

The land in question was waste land belonging to Minakshi Devasthanam. One Balakrishna Naidu, through whom the plaintiff claims, applied for the same on 13th December 1886 on darkhast on paying a premium of Rs. 50 and the punja tirva for dry cultivation and the nunja tirva for the wet cultivation. The darkhast mentioned the land as being 30 kulis. No term was mentioned. The kurnain reported that it was only 17½ kulis. The order was passed after the report that the application of Balakrishna Naidu may be granted. The plaintiff's case was that Balakrishna was put in possession of the land and was enjoying the same, that afterwards he sold it to the plaintiff who was also enjoying the same

ever since his purchase, that when he proceeded to build on a portion of the land, he was obstructed by defendants 2 to 5 on behalf of 1st defendant and that he was ousted from a portion of the land in 1897. He therefore sued in ejectment. The District Munsif held that the darkhast and the order was a lease which ought to be registered and that as other evidence was inadmissible, the plaintiff must be non-suited. On appeal the District Judge held that registration was not compulsory, that the document was a sale, that it was below Rs. 100, and that under S. 54, Transfer of Property Act, property would pass when there was delivery. He also held that plaintiff might rely upon his possession and that defendants must therefore show a better title. He therefore remanded the suit. Hence this appeal.

Ramasamy
Aiyar
v.
Thirupathi
Naick.

P. S. Sivaswami Aiyar for appellant.

K. N. Aiyar for respondent.

The Court delivered the following

JUDGMENT:—We think that the endorsement of the Manager on the memorandum of darkhast, which endorsement was communicated to the applicant, must be taken to be an agreement to lease and therefore to be subject to the provisions of the Registration Act as if it were a lease. But treating it as a lease, we do not think that it requires registration under S. 17 of the Act. It does not in terms purport to be for a period exceeding five years, nor does the rent reserved by it exceed Rs. 50 *per annum*.

It is therefore exempted from registration by the Notification of Government published under that section.

It is argued that by custom a lease of this kind entitles the grantee to hold permanently. It may or may not be so; but the criterion for registration is what is expressed on the face of the document.

If we had to go into the question of what incidents are annexed by custom to grants of the kind, we would have to bear in mind that one of such incidents is that the tenant can relinquish the holding at the end of any fasli and therefore before the expiry of five years.

The appeal therefore fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH).

Present :—Sir Charles Arnold White, *Chief Justice*,
Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Achuta Bhatta ... Appellant* (*1st Defendant*).

v.

Manjunathayya and another Respondents (*Plaintiff and
2nd defendant*).

Achuta
Bhatta
v.
Manju-
nathayya.

Legal Practitioners Act, Rules 31 and 35—Suit for declaration of title to immoveable property—Pleader's fee.

Rule 31 of the Rules framed under the Legal Practitioners Act, is not confined to cases in which Court fees are payable *ad valorem*.

A suit for a declaration of right in respect of immoveable property is not a suit in which "the subject-matter of the claim does not admit of valuation" within the meaning of Rule 35, but falls within Rule 31, and the pleader's fee must be fixed with reference to the latter rule.

Second appeal from the decree of the District Court of South Canara in A. S. No. 205 of 1900, presented against the decree of the Court of the District Munsif of Udipi in O. S. No. 219 of 1900.

This Second appeal coming on for hearing on 28th April 1903, the Court (Mr. Justice *Subrahmania Aiyar* and Mr. Justice *Moore*) made the following to

ORDER OF REFERENCE A FULL BENCH :—We see no reason to hold either that the suit is barred or that the plaintiff is not entitled to a declaration. It is urged that the vakil's fees allowed by the District Judge in appeal (Rs. 25) is excessive. As to this we agree. It is, however, further urged that as this is a suit for a declaration in respect to immoveable property, which, according to the plaintiff, is valued at Rs. 255, no fee higher than an *ad valorem* fee on that amount can be allowed, and we are referred to the decision of a Bench of this Court in S. A. No. 1214 of 1901 where this view appears to have been taken. As doubts are entertained as to whether rule No. 35 of the rules framed by the

* S. A. No. 1461 of 1901.

14th July 1903.

High Court under the Legal Practitioners Act (Rule No. 282 of the Civil Rules of Practice, 1902) can be held to be subject to the proviso, that in a suit for a declaration with reference to immoveable property no higher fee can be allowed than would be passed in the case of a suit for the recovery of possession of the same property, we refer the following question to a Full Bench :—

“In a case for a declaration with respect to immoveable property is the fee to be allowed to a vakil limited to a sum not exceeding the maximum fee allowable in a suit for the possession of the same property?”

C. Ramachandra Rao Saheb for appellant.

K. Narayana Rao for respondents.

The Court expressed the following

OPINION :—We are of opinion that a suit for a declaration of right in respect of immoveable property is not a suit in which the subject “matter of the claim does not admit of valuation” within the meaning of Art. 35 of the rules framed under the Legal Practitioners Act. Such a suit falls within Art. 31 and a reference to Rule 33 which defines the expression, the amount or value of the claim occurring in Rules 31 and 32, clearly shows that Rule 31 is not confined to cases in which Court fees are payable *ad valorem*. Our answer to the question referred is in the affirmative.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*,
and Mr. Justice Moore.

Adilakshmi and another	...	...	Appellants*
			(Defendants).
v.			
Venkataramayya	...	...	Respondent
			(Plaintiff).

Civil Procedure Code S. 13 Expln. II—Res Judicata—Suit to set aside adoption by one reversioner—Decision how far binding on another—Limitation Act Art. 118 meaning of “becomes known to Plaintiff”—Position of reversioner—Alternative case—Implied adjudication.

Adilakshmi
v.
Venkataramayya.

A decision in a suit brought by one reversioner to set aside an adoption by the widow or to declare an alienation made by the widow invalid is not *res judicata* as against another reversioner and does not bind such reversioner.

One reversioner does not claim through another.

Adilakshmi
v.
Venkata-
ramayya.
—
Chief Justice.

The words "becomes known to plaintiff" in Art. 118 of the Schedule to the Limitation Act must be understood in their natural meaning and the word "plaintiff" cannot include a reversioner who stands in the same grade as another and who claims as heir of the last male owner in common with such other

*Bhagavanta v. Sukhi*¹ followed; and *Ayyadurai Pillai v. Solai Ammal*² discussed

Where a widow and the adopted son sued as co-plaintiffs and made their claim in the alternative. The defendants in such a suit were not bound to dispute the adoption and a decision in favour of the adopted son was not such an adjudication as to raise an estoppel under S. 13, Explanation II.

Second Appeal from the decree of the District Court of Godavari at Rajahmundry in A. S. No. 210 of 1900 presented against the decree of the Court of the District Munsif of Bheemavaram in O. S. No. 254 of 1899.

P. S. Sivaswami Aiyar for *V. Krishnaswami Aiyar* for appellants.

K. Ramachandra Aiyar for *P. R. Sundara Aiyar* for respondents.

The Court delivered the following

JUDGMENTS :—THE CHIEF JUSTICE—The main contention put forward on behalf of the appellants in this case was that the claim is barred as *res judicata* by reason of the adjudication in a suit brought in 1896 by another reversioner, the plaintiff's elder brother, in which the then plaintiff sought to have the alleged adoption set aside. This suit was dismissed upon the ground that it was barred by limitation. The point now relied on was not raised in the issues and was not taken in the Courts below. Strictly speaking, therefore, the appellants were not entitled to raise it here. We, however, allowed the question to be argued. The period of limitation prescribed by Art. 118 of the second schedule to the Limitation Act of 1877 for obtaining a declaration that an alleged adoption is invalid, or never in fact took place, is six years from the time when the alleged adoption became known to the plaintiff. The arguments urged on behalf of the appellants have failed to satisfy me that a meaning other than the natural meaning should be given to the words "*becomes known to the plaintiff*" at any rate when, as here, the reversioner who brought the former suit and the reversioner who brings the present suit both stand in the same grade of relationship and are both equally entitled to succeed on

1. I. L. R., 22 A—33.

2. I. L. R., 24 M. 405.

the determination of the life estate. In the present case the present plaintiff in no sense claims through the former plaintiff, whilst the former plaintiff did not purport to sue, and did not, as it seems to me, either in fact or in law sue as representing the inheritance. The question has been considered by the Privy Council on more than one occasion. In the judgment of the Privy Council in *Ieri Dut Koer v. Mussumut Hansbutti Koerain*¹, their Lordships, in dealing with a suit brought by a reversioner during the lifetime of the widow to have an alienation made by the widow declared to be void, except for her life, observe (on p. 157): "The only reason assigned for refusing relief on the ground of discretion is that part of the case raises a difficult point of law, the decision of which, though involving expense and delay, may after all not be binding upon the actual reversioners. That may be a reason more or less weighty according to circumstances. In this case it does not apply to the original estate of Budnath, as to which the plaintiffs are clearly right and the defendants clearly wrong in their contention. Nor is it readily conceivable that the decision will be fruitless; because the question of law is of such a nature that its decision, though not binding as *res judicata* between the widows and a new reversioner would be so strong an authority in point as probably to deter either party from disputing it"

Adilakshmi
v.
Venkataram-
ayya.
Chief Justice.

On principle there would seem to be no distinction so far as the point now before us is concerned between a suit for a declaration that an alienation is invalid and a suit for a declaration that an alleged adoption is invalid. The decision of the Full Bench of the Allahabad High Court in *Bhagwanta v. Sukhi*² is in point, and it seems to me that that decision is right. The decision of this Court in *Ayyadorai Pillai v. Solai Ammal*³ upon which the appellants strongly relied, went upon the ground that the daughter, the party against whom the earlier decree had been obtained, represented the inheritance and that a decision against the daughter in regard to a matter connected with the inheritance was binding on persons entitled to take the estate in succession to her as reversionary heirs of the last male owner. It is not necessary for us to consider whether on the facts of that case we should agree with the view taken by the judges that the daughter represented the

1. I. L. R., 10, I. A. 150. 2. I. L. R., 22 A. 33. 3. I. L. R., 24 M. 405.

Adilakshmi v. Venkataram-ayya. Chief Justice. inheritance. It is quite clear that the judgment was based upon the ground and only on the ground that she did so. In the present case it cannot be said that the plaintiff in the former suit represented the inheritance or that the present plaintiff claims through the former plaintiff. Both claim as heirs of the last male owner, the husband of the widow.

It was also argued on behalf of the appellant that the claim of the plaintiff in the present suit is barred by reason of an adjudication in a suit in 1894 in which the widow and the alleged adopted son were co-plaintiffs. There was no issue with reference to the question of adoption but the decree was in favour of both plaintiffs. In this state of things it was suggested that Expl. II to S. 13 of the Code of Civil Procedure applies. I think this is clearly not so. The claim in that suit was made in the alternative, and the then defendant was not bound to make it a ground of defence that no adoption had taken place.

If the claim were well-founded one of the plaintiffs was bound to succeed, adoption or no adoption.

I think both the appellant's contentions fail and that this appeal should be dismissed with costs.

MOORE J. :—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Bhashyam Aiyangar.

Sesha Aiyar and another ... Petitioners* (*Respondents*
2 and 3).

v.

Nagarathna Lala, minor by his
next, Bhavani Bai Ammal... Counter-Petitioner (*Appellant*).

Sesha Aiyar v. Nagarathna Lala. *Civil Procedure Code, Ss. 549, 647 and 652. Judgment of single Judge—Appeal under the Letters Patent—Security for costs.*

S. 549 of the Civil Procedure Code applies only to appeals preferred to the High Court from the Subordinate Courts subject to its appellate jurisdiction.

Sabapathi Chetty V. Narayanasami Chetty referred to.

S. 549, C. P. C., is inapplicable to appeals under the Letters Patent from the decision of a single Judge of the High Court to two Judges; and S. 647 does not extend it to such appeals.

* C. M. P. No. 370 of 1903.

15th July 1903.

1. I. L. R., 25 M. 555.

No rule for taking security for costs having been in force in the old Sudder Court in such cases, S. 9 of the Charter Act has no application.

Sesha Aiyar
v.
Nagarathna
Lala.

No rule has been passed by the High Court under S. 652. C. P. C.

Quære—Whether it would be competent to the High Court to pass such a rule under S. 652, C. P. C.

Application praying that, in the circumstances stated in the affidavit filed therewith the High Court will be pleased to order the appellant in L.P.A. No. 1 of 1903, on the file of the High Court, to furnish security to the extent of Rs. 530 for the costs of the respondents 2 and 3 therein.

M. R. Sankara Aiyar for petitioners.

K. Balamukunda Aiyar for counter-petitioner.

The Court made the following

ORDER :—In my opinion the respondent in a Letters Patent Appeal preferred against the decision of a single Judge of this Court in a mofussil case cannot apply for security being demanded from the appellant for costs. S. 549 of the Civil Procedure Code applies only to appeals preferred to the High Court from Subordinate Courts subject to its appellate jurisdiction (*Sabapathi Chetti v. Narayanasami Chetti*¹, and not to appeals preferred to the High Court under S. 15 of the Letters Patent from the judgment of one of its Judges. Assuming that it would be competent to the High Court to pass such a rule; no rule has been made under S. 652 of the Code of Civil Procedure authorizing the making of such an application. It is also conceded that no such rule was in force in the old Sudder Court, and that being so, S. 9 of the Charter Act cannot be relied upon in support of this application. I am unable to accede to the argument that S. 647 of the Civil Procedure Code applies to Letters Patent Appeals and that, therefore, the provisions of S. 549 are extended to Letters Patent Appeals. The petition is therefore rejected but without costs.*

1. 1. L. R., 25 M. 555 at 558.

* [Nor can stay of execution be had pending a Letters Patent Appeal. See order on C. M. P. 882 of 1903 in L. P. A. 39 of 1903.—Ed.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

In S. A. No. 1431 of 1901.

Pallayya and others ... Appellants* (1 to 4 & 7 Defts.)

v.

Ramavadhanulu ... Respondent (*Plaintiff*).*In S. A. No. 1432 of 1901.*Mallayya ... Appellant (*Defendant*).

v.

Ramavadhanulu. ... Respondent (*Plaintiff*).Pallayya
v.
Ramavadha-
nulu.*Religious endowment—Dedication of idol and land—Public religious purpose—Founder of idol constituting himself dharmakarta—Gift—Transfer of Property Act, 122—Meaning of 'donee'—Declaration of trust—Trust Act II of 1882, Ss. 1 and 5—Denial of execution—Registration, effect of.*

A dedication of an idol and land for the building of a temple for the same is not a gift within S. 122 of the Transfer of Property Act.

The word "donee" in that section refers to an ascertained or ascertainable person or persons by whom or on whose behalf the gift can be accepted or refused and has no application to an unascertained number of persons such as the public.

A declaration of trust in relation to immoveable property for a public religious purpose is not governed by the Indian Trusts Act which by S. 1 is declared inapplicable to a religious endowment.

Where the plaintiff found an idol in his land and executed a document in favor of the idol to the effect that a piece of land belonging to him was given by him to the idol for a temple being built on it, that he had no objection to a permanent temple being built on it and that he bound himself to be the Dharmakarta of the idol, but did not register it and upon its being presented for registration denied execution and the document was compulsorily registered.

Held—(1) That there was a dedication of the land to the public (i. e., as a public religious institution.)

(2) That it did not require registration under S. 122, T. P. Act.

(3) That there was no transfer of property, the plaintiff only constituting himself a Dharmakarta.

(4) That it was a declaration of trust in relation to immoveable property.

(5) That such declaration of trust was for a public religious purpose.

(6) That, therefore, the Indian Trusts Act II of 1882, S. 5 had no application.

(7) That the transaction not being a gift within the meaning of S. 122,

Transfer of Property Act, nor a trust within the meaning of the Indian Trusts Act, the refusal to register the document and denial of execution before the Registrar did not take away the effect of dedication and the registration under the Registration Act.

* S. A. Nos. 1431 and 1432 of 1901.

24th April 1903.

Second appeals from the decrees of the Subordinate Judge's Court of Cocanada in A. S. Nos. 218 and 219 of 1900 presented against the decrees of the Court of the District Munsif of Amalapur in O. S. Nos. 165 and 603 of 1899.

Pallayya
v.
Ramavadhanulu.

A certain land in the village of Amalapuram belonged to the plaintiff. While he was digging in this land he found an idol. He named it Venkateswara, and being unable to build a temple for the idol he called in the defendant for assistance, and they consented to build a temple if he should constitute the idol as public property. The plaintiff then gave Ex. I. It ran thus:

"The help of Sree Venkateswaraswamy is solicited. The letter executed by Godavorthy Ramavadhanulu, a resident of Amalapuram, in favor of Sree Venkateswaraswamy of the same place, is as follows:—I found you in the inam land which I bought from carpenters and Rayapeddi Varu and which I was enjoying. You have been placed there. The land of 5 Kunchams is given to you out of my own free will, so that a temple may be built on it. In case a permanent temple may be built for you, neither I nor my heirs will object. I bind myself to be your Dharmakarta."

The plaintiff denied execution of this, but it was registered compulsorily by the Registrar. The plaintiff, alleging that the idol was his private property and that he was entitled to the offerings now sued the defendants for a declaration of his right to the idol and for recovery of the land and the idol and for loss of offerings. The defendant's contention was that the idol was public property, that the defendant and some others built the temple at their expense, that in consultation with the villagers the defendants 1, 2, 4 and 5 and some others were appointed Dharmakartas and that the plaintiff was therefore not entitled to maintain the suit. The District Munsif held that the procedure prescribed by the Treasure Trove Act had not been followed by the plaintiff, that the idol could not therefore be said to be vested in him, that even if he was owner there was a valid giving under Ex. I. He therefore dismissed the plaintiff's suit. Upon appeal the Sub-Judge found that the plaintiff was the owner, that it was not his fault that the Collector did not make any enquiry under the Treasure Trove Act, that under Ex. I, there was no valid giving as the donor withdrew his consent before registration but that upon the faith of his promise to dedicate the defendants spent money in building the temple, &c. He there-

Pallayya
v.
Ramavadh-
nulu.

fore gave a decree for the recovery of the land and the idol upon payment of the expenses incurred by the defendants or that plaintiff should receive Rs. 200 as price for the land and give up his right in favor of the defendants. He gave him a decree for the offerings after deducting the necessary expenses incurred by the defendants for the performance of the poojah and festivals. The plaintiff thereupon preferred this second appeal.

T. V. Seshagiri Aiyar for appellants in S. A. Nos. 1431 and 1432.

K. Naraina Rao for respondent in S. A. Nos. 1431 and 1432.

The Court delivered the following

JUDGMENT :—We do not think that the judgments of the Subordinate Judge can be supported. We think that his construction of Exhibit I as not amounting to a dedication of the idol and the land in question as a public religious institution is erroneous.

By Exhibit I the plaintiff dedicated the land to the idol, so that a temple may be built on it, and he adds that "in case a permanent temple is built thereon for the idol, neither he nor his heirs will raise any dispute". These words would be inapplicable if it was a trust for a private family idol which the plaintiff was creating. A stone temple was being created on the site by the 5th defendant though it was not completed at the date of the suit. The District Munsif fully refers to other circumstances which clearly support the view which we take based on the terms of Exhibit I.

We are clearly of opinion that the dedication of the idol and land to the public is not a gift within the definition of that term in S 122 of the Transfer of Property Act. In our opinion the word "donee" is not applicable to the public. It must denote an ascertained or ascertainable person or persons by whom or on whose behalf the gift can be accepted or refused. Further under Exhibit I there is really no transfer of property (*cf.* S. 122) the plaintiff declaring and constituting himself under Exhibit I the Dharma-karta or trustee of the temple. Exhibit I amounts only to a declaration of trust in relation to immoveable property for a public religious purpose, the plaintiff, the author of the trust, declaring himself to be the trustee without transferring his ownership in the

trust property to another. The Indian Trusts Act No. II of 1882 being inapplicable to religious endowments (*Vide S. I.*), neither is Exhibit I governed by S. 5 of that Act. Though Exhibit I was not voluntarily registered by the plaintiff, its compulsory registration is effectual for the purpose of the Registration Act and the transaction not being a "gift" within the meaning of the Transfer of Property Act nor governed by the Indian Trusts Act, the decision in *Banamirtha Ayyan v. Gopala Ayyan*¹ on which the Subordinate Judge relies is inapplicable to the case. We therefore allow second appeals 1431 and 1432 and reversing the decrees of the Subordinate Judge restore those of the District Munsif with costs of defendants 1 to 4 and 7 in this and in the lower appellate Court.

Pallayya
v.
Ramavadhahulu.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—Sir Charles Arnold White, *Chief Justice*,
and Mr. Justice Benson.

Muthusami Mudaly ... Appellant* (*9th Defendant*).

v

Ayyalu Bathadu... ... Respondent (*Plaintiff*).

Civil Procedure Code, S. 283—Order upon claim—Judgment-debtor when a party—Necessity to sue in a year—Mortgage with power of sale—Deposit of title deeds by Mortgagee—Return of title deeds to Mortgagee—Exercise of power—Title of purchaser.

An order under S. 283, C. P. C., passed in a claim proceeding would bind the judgment-debtor if he was a party to such order.

Whether he was a party to such order will depend upon the circumstances under which the order was made and the terms of the order itself.

*Gurura v. Subbarayudu*² approved and *Sardhar Lal v. Ambika Parshad*³ referred to.

Where the evidence as to service of the notice of claim is inconclusive, and the order upon the claim does not show on its face that the judgment-debtor has been a party to the same and the order is not necessarily inconsistent with the title being in the judgment-debtor (as where it states simply that claimant is in possession) such order cannot be said to have been made against the judgment-debtor within the meaning of S. 283, C. P. C., so as to oblige the latter to bring a suit to set aside the order within a year.

Where the mortgagee parts with the title-deeds of the mortgaged property (as where he deposits them by way of equitable mortgage) and gets them back he can validly exercise the power of sale contained in the mortgage-deed so as to confer a valid title on the purchaser.

Muthusami
Mudaly
v.
Ayyalu
Bathadu.

* C. C. C. A. No. 10 of 1901.

12th March 1902.

1. I. L. R. 10 M. 433.

2. I. L. R., 13 M. 366.

3. I. L. R., 15 C. 521.

Muthusami
Mudaly
v.
Ayyalu
Bathadu.

Appeal from the decree of the City Civil Court in O. S. No. 5 of '00.

T. V. Seshagiri Aiyar and *V. Bhashyam Aiyangar* for
M. Krishnamachariar for appellant.

P. S. Sivaswami Aiyar and *T. Ethiraja Mudaliar* for
respondent.

The Court delivered the following

JUDGMENT:—The first contention relied upon by the appellant (the 9th defendant) was that by reason of an order (Exhibit I) made under S. 280 of the Code of Civil Procedure in proceedings in which one Subraya Pillai was the judgment-creditor, Subraya Chetty (the plaintiff's vendor) was the judgment-debtor, and the appellant was the claimant, the plaintiff's suit, as against the appellant (9th defendant) is barred by S. 283 of the Code of Civil Procedure. An order under S. 280 is conclusive as against the party against whom it is made unless a suit is brought within the prescribed time to establish the right claimed to the property in dispute. In the present case no suit was brought within the prescribed time. The question therefore is—was the order allowing the claim of the appellant made under S. 280 an order made against Subraya Chetty (the judgment-debtor) within the meaning of S. 283. We think the test to apply is that laid down in *Guruva v. Subbarayudu*¹.

The judgment-debtor may be the party against whom an order upon a claim in execution proceedings is made so as to be bound thereby. Whether he is such a party or not must depend upon the facts of each case *i. e.*, the circumstances in which the order is made and the terms of the order itself. The case of *Guruva v. Subbarayudu*¹ was decided in 1890, and the attention of the learned judges who decided that case was apparently not called to the Privy Council decision in the year 1888 in *Sardhari Lal v. Ambika Pershad*². But the observation of their Lordships of the Judicial Committee on which the respondent relied, when read with its context does not seem to us to be inconsistent with the rule laid down in *Guruva v. Subbarayudu*. We do not think the judgment of the Full Bench in *Damodren Nambudry v. Parameshwaren Nambudry*³ precludes us from holding, on the facts of this case, that the order in the execution proceedings is not conclusive as against the plaintiff. The notice which

1. 1. L. R., 13 M. 366. 2. I. L. R., 19 C. 521. 3. 4. M. H. C. B., 472.

was served on the judgment-creditor was merely to show cause why the sale should not be stayed until the claim was disposed of (Exhibit VI). There is a conflict of evidence as to whether this notice was in fact served on the judgment-debtor (Subraya Chetty). There is no doubt, however, that the judgment-debtor attended the proceedings and gave evidence (see Exhibit IV). He is described as the first witness for the defendant; and in his evidence he describes himself as the defendant. The order recites that the application was made in the presence of the Vakil for the judgment-creditor and the vakil for the claimant, but does not recite that it was made in the presence of the defendant. The order states that the claimant has been in possession, and the defendant has not, but does not refer to the question of title. The claim was allowed and the judgment-creditor was directed to pay the claimant's costs. Having regard to the inconclusive character of the evidence as to service of notice on the judgment-debtor, to the fact that it does not appear on the face of the order that the judgment-debtor appeared as a party at the proceedings in which the order was made and to the fact that the terms of the order are not necessarily inconsistent with the title being in the judgment-debtor we think the order cannot be said to have been made against the judgment-debtor within the meaning of S. 285.

The second contention relied on by the appellant was that at the time of the sale by Subraya Chetty to the plaintiff, Subraya had parted with his interest in the property in question and could confer no title on the plaintiff.

Now under the mortgage deed of August 1890 (N) Subraya had a mortgage interest which gave him a power of sale. No doubt Subraya parted with the title-deeds in 1891 to one Saba-pathy Chetty. There were various assignments under which the assignees stood in the shoes of Subraya. In 1896 or 1897 Subraya got back the title-deeds through Raju Naick. His original rights, therefore, reverted in him, namely, his rights as mortgagee with a power of sale which were given him by the instrument of August 1890. We think the plaintiff acquired a good title under the sale deed of 19th July 1899.

These were the only contentions which were pressed before us. We think the City Civil Court Judge was right.

The appeal is, therefore, dismissed with costs.

Muthusami
Mudaly
v..
Ayyala
Bathadu.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Kandasami Asari and others... Appellants* (*Defendants* 3, 5, 6 & 7).

v.

Subramania Pillai ... Respondent (*Plaintiff*).

Kandasami Asari
v.
Subramania Pillai

Malicious Prosecution, action for—Prosecution for offence—Application for security for good behaviour.

To sustain an action for malicious prosecution there must have been a prosecution by the defendants of the plaintiff for an offence.

Where an application is made by the defendants to a Magistrate that security should be taken from the defendants under Ss. 107 and 110 of the Criminal Procedure Code, there is no prosecution of the plaintiff by the defendants for an offence, and no action for malicious prosecution will lie.

Second appeal from the decree of the District Court of Tinnevely in A. S. No. 8 of 1900 presented against the decree of the Court of the District Munsif of Tinnevely in O. S. No. 404 of 1898.

A. S. Balasubramania Aiyar for appellants.

M. R. Ramakrishna Aiyar for respondent.

The Court delivered the following

JUDGMENT:—The defendants presented a petition to the Divisional Deputy Magistrate giving him information that it was necessary that security should be taken from the plaintiff and others under Ss. 107 and 110, Criminal Procedure Code. The Deputy Magistrate referred the petition to the Sub-Magistrate for enquiry and report as to the truth of the allegations in it. On receipt of his report the Deputy Magistrate recorded his opinion that no further action was necessary, and no further action was taken. It is therefore clear that whatever other remedy the plaintiff may have, an action for damages for malicious prosecution will not lie. To sustain such an action there must have been a prosecution by the defendants of the plaintiffs for an offence. The second appeal is allowed; and the suit dismissed with costs throughout.

* S. A. No. 998 of 1901.

21st November 1902.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Bhashyam Aiyangar.

[illegible]

v.

Srinivasa Row Sahib ... Respondent
(Defendant).

*Landlord and Tenant—Tender of two pattas within the fasli—Practice for a long time Govinda Setti
—Acquiescence—Objection when to be taken.* V.

A patta may be reduced to writing in two separate papers and a tender by the landlord of both the papers within the fasli is unobjectionable.

Where it has been the practice to tender such second patta for a long time and the tenant has been accepting it during that time, whichever party objects must give timely notice to the other of his objection.

Second appeal from the decree of the District Court of North Arcot, in A. S. No. 6 of 1901, presented against the decision of the Court of the Deputy Collector of North Arcot, in Summary Suit No. 14 of 1900.

J. L. Rosario for appellant.

P. S. Sivaswami Aiyar for *P. R. Sundara Aiyar* for respondent.

The Court delivered the following

JUDGMENT:—The objection that a second pattah could not be issued for the second crop on land for which a pattah had already been issued cannot be insisted upon, so far at any rate as Fasli 1308, to which the suit relates, is concerned, inasmuch as the appellant accepted the first pattah for that fasli without demur, according to the practice in force for several years preceding. Such practice amounted to the pattah being reduced to writing in two separate papers, which is unobjectionable so long as both the papers are tendered within the fasli, as was done in this case. It may be that neither party is bound to continue the practice in future, but whichever party objects must give timely notice to the other of his objection. The second appeal therefore fails and is dismissed with costs.

* S. A. 1331 of 1901.

23rd September 1902.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Kothandarama Routh and

another

...

Appellants* (*3rd Defendant and Supplemental Appellant*).

v.

Murugesu Mudali & another. Respondents (*Plaintiff and 1st Defendant*).

Kothanda-
rama Routh
v.
Murugesu
Mudali.

Civil Procedure Code, 244—Indian Insolvency Act, 1843, S. 7—Insolvency petition—Vesting order—Composition with creditors—Dismissal of petition—Revesting—Attachment—Trustee's right to claim—Maintainability of suit.

S. 7 of the Insolvency Act, 1843, provides that if, after the making of any vesting order, the insolvent's petition should be dismissed, the vesting order becomes null and void from and after such dismissal, provided, however, that all acts done by the Official Assignee in the interim will be good and valid and has the effect of revesting the property in the insolvent retrospectively from the date of the vesting order.

Where a vesting order is made and then the insolvent enters into a composition with his creditors and his insolvency petition is afterwards dismissed, such composition-deed is valid and upon the dismissal of the petition the property reverts in the insolvent.

A trustee under a composition-deed executed by the judgment-debtor before attachment of his property is entitled to bring a suit to set aside the attachment and such a suit is not barred by S. 244, C. P. C.

Second appeal from the decree of the District Court of Trichinopoly in A. S. No. 3 of 1900 presented against the decree of the Court of the District Munsif of Trichinopoly in O. S. No. 251 of 1896.

V. Krishnaswami Aiyar and *A. S. Balasubramania Aiyar* for appellants.

T. V. Seshagiri Aiyar for 1st respondent.

V. Ramesam for *R. Kuppusami Aiyar* for 2nd respondent.

The Court delivered the following

JUDGMENT:—The question which has been principally argued in support of this second appeal is that the composition-deed to which among others the appellant was a party and which was executed after the order of the Insolvency Commissioner in the High Court was passed, and before the dismissal of the insolvent's petition and the re-vesting order, is inoperative to transfer the pro-

* S. A. No. 1138 of 1900.

19th March 1903.

perty comprised in the composition-deed to the plaintiff and other persons appointed as trustees and that it cannot therefore prevail against the attachment made by the appellant, though such attachment was made subsequent to the composition-deed.

Kothanda-
rama Routh
v.
Murugesu
Mudali.

Having regard to S. 7 of the Indian Insolvency Act, 1848, we think that this argument is untenable. That section provides that in case after the making of any vesting order, the insolvent's petition should be dismissed, the vesting order shall from and after such dismissal become null and void subject, however, to the condition that all acts done by the Official Assignee prior to the dismissal of the petition shall be good and valid, a saving which would be unnecessary if the re-vesting had not retrospective effect. We may observe that the section does not provide that the estate shall re-vest in the insolvent without any conveyance or assignment by the Official Assignee, though a provision is made in the earlier part of the section for the vesting of the property in the Official Assignee without any conveyance or assignment by the insolvent. In our opinion the use of the phrase "null and void" has the effect of re-vesting the property in the insolvent retrospectively from the date of the vesting order, and provision is therefore made for validating all acts done by the Official Assignee in the interval between the date of the vesting order and the dismissal of the insolvent's petition.

The view which we take of S. 7 is in accordance with that taken by a division bench of this court in *Ramasami Kottadiar v. Murugesu Mudaliar*¹.

Independently therefore of S. 43 of the Transfer of Property Act the composition-deed will be operative to vest the property in the trustees.

The attachment therefore was rightly raised on a claim made by the plaintiff as trustee under the composition-deed. The plaintiff is the only trustee now alive except one who had renounced the trusteeship without the intervention of the court in accordance with a power contained in the trust deed. It is clear that S. 244 of the Civil Procedure Code is no bar to this suit.

The second appeal therefore fails and is dismissed with costs of the 1st respondent.

1. I. L. R., 20 M. 452.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH.)

Present :—Sir Charles Arnold White, *Chief Justice*,
Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Kelu Nedungadi and another ... Appellants* (*Plaintiffs*).

v.

Krishnan Nair and others ... Respondents* (*Defendants*).

Kelu Nedungadi v. Krishnan Nair. Kanom—Meaning of “*Avasyamai Chodikumbole*” or “*Avasyamayi Vendumbole*”—*Redemption by Jenmi within 12 years—Necessity to show special exigency.*

A suit for redeeming a kanom within 12 years from the date of the kanom is maintainable even where the kanom contains provision that the Jenmi should recover only “*Avasyamai Chodikumbole*” or “*Avasyamayi Vendumbole*” and the jenmi need not show any special exigency before he is allowed to redeem.

The words “*Avasyamai Chodikumbole*” or “*Avasyamayi Vendumbole*” mean only “on demand.” *Mahomed v. Ali Koya*, overruled.

Second appeal from the decree of the District Court of South Malabar at Calicut in A. S. No. 240 of 1901, presented against the decree of the Court of the Additional District Munsif of Calicut in O. S. No. 560 of 1900.

This Second Appeal coming on for hearing on 5th March 1903, the Court (Mr. Justice *Subramania Aiyar* and Mr. Justice *Benson*) made the following

ORDER OF REFERENCE TO A FULL BENCH.—The question is as to the construction of the words “*Avasyamai Chodikumbole*” in Exhibit B and “*Avasyamayi Vendumbole*” in Exhibit I. Do they mean nothing more than “on demand” or do they mean “on demand based on some special exigency” on the part of the plaintiffs.

The decision in cases which turned on words identical or substantially similar are not uniform.

In *Mahomed v. Ali Koya*¹, and in the unreported case therein referred to, the latter view was adopted, while in two unreported cases, S. A. Nos. 1665 of 1898 and 269 of 1899, the former view was taken.

* S. A. No. 1563 of 1901.

13th July 1903.

1. I. L. R., 14 M. 76.

The question is one of considerable practical importance in Malabar, and we resolve to refer it for the decision of a Full Bench.

Kelu Nedun-
gadi
v.
Krishnan
Nair.

K. P. Govinda Menon for appellants.

C. V. Anantakrishna Aiyar for 2nd respondent.

The Court expressed the following

OPINION :—We are of opinion that the Malayalam words mentioned in the order of reference do not impose on a jenmi the obligation of proving “some special exigency” as a condition precedent to his right to recover “on demand” before twelve years.

We think S. A. No. 1665 of 1898 was rightly decided and we dissent from the decision in *Mahomed v. Ali Koya*¹ that “special exigency” must be proved.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subramania Aiyar and Mr. Justice Davies.

Shouri Anna Appellant*
v. (Plaintiff).

Anthoni Muthu and 6 others.

Sub-mortgage—Express assignment—Intention to keep alive—Right of mortgagor to redeem—Nature of decree—Civil Procedure Code, S. 264.

Shouri Anna
v.
Anthoni
Muthu.

Where there is an express assignment of a prior charge (sub-mortgage) no question of keeping that charge alive arises.

Where a sub-mortgage is outstanding, the mortgagor is only entitled to a decree for redemption after paying off the amount due under the sub-mortgage and is not entitled to a decree for possession under S. 264, C. P. C.

Second appeal from the decree of the Subordinate Judge's Court of South Malabar at Palghat, in A. S. No. 415 of 1900, from the decree of the Court of the District Munsif of Palghat in O. S. No. 145 of 1899.

This was a suit for redemption of 3 items of land demised on Kanom in 1843 by plaintiff's father to 1st defendant's grandfather.

* S. A. No. 835 of 1901.

22nd October 1902.

1. I. L. R., 14 M. 76.

Shouri Anna
v.
Anthoni
Muthu.

The 2nd defendant pleaded that plaintiff's father had sold the properties to 1st defendant's grandfather in 1850 and that 1st defendant and his relatives sold them to one Appavu who sold it to 2nd defendant. The District Munsif found that the sale of 1850 was not true and gave a decree for redemption upon the Kanom of 1843 and ordered the defendants to surrender possession upon payment of the mortgage amount together with some compensation fixed on account of improvements. The District Judge upheld the finding of the Munsif that the sale of 1850 was not true, but found that the 1st defendant's father executed a mortgage for Rupees 285-11-5 to one Shuppu Chetty under Exhibit XX on 11th May 1885, that Shuppu Chetty assigned it to Appavu who transferred his rights to 2nd defendant and that the latter was entitled to the benefit of Art. 134 of the Limitation Act to the extent of the mortgage under Exhibit XX. He, therefore, modified the decree by declaring that Exhibit XX was valid as against plaintiff and directed the possession of the properties comprised under Exhibit XX (a portion of the properties comprised in the Kanom) to be delivered under S. 264, C. P. C. The plaintiff preferred this second appeal.

P. S. Sivaswami Aiyar for *P. R. Sundara Aiyar* for appellant.

B. Govindan Nambiar for *J. L. Rosario* for 1st respondent.

The Court delivered the following

JUDGMENT:—We are unable to agree with the appellant's Vakil's contention that the 2nd defendant is not entitled to rely on the possession of the sub-mortgagee whose title has passed to the 2nd defendant. As the title passed under an express assignment, no question as to whether there was an intention to keep alive the sub-mortgage can arise.

The Subordinate Judge was, however, wrong in giving possession to the plaintiff under S. 264 of the Code of Civil Procedure of the lands comprised in the sub-mortgage (Exhibit No. 20.)

He should have given a redemption decree as to them also. In substitution of the decrees of the Courts below, it is hereby ordered and decreed that upon payment by the plaintiff to the 2nd defend-

ant within six months from this date of the mortgage amount Rs. 285-11-6 secured by Exhibit 20 and of the value of improvements Rs. 35-1-3 less the plaintiffs' costs of the suit decreed to him by the Court of first instance and amounting to Rs. 100-6-0 with interest on such costs at 6 per cent per annum from the 28th March 1900 till the date of payment; the defendant/s shall deliver up to the plaintiff or to such person as he appoints all documents in their possession or power relating to the plaint properties (A series in the plan) and shall re-transfer the whole of the plaint properties to the plaintiff free from the mortgage and from all incumbrances created by the defendants or any person claiming under them and shall put the plaintiff into possession of the plaint properties (A series in the plan) with all appurtenances thereon excluding the four palmyra trees standing on the western side of A2. The parties will bear their own costs in this and in the lower appellate Court.

Shouri Anna
v.
Anthoni
Muthu.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Alagappa Chettiar	...	Appellant* Petitioner
		(Plaintiff).
v.		
Tirunagavalli and others	...	Respondents (<i>Respondents 1 to</i>
		<i>4 and Defendants 1 to 4</i>).

Remission of Rent or revenue—Discretion of Collector—Landlord and Tenant—Obligation only moral not legal.

Alagappa
Chettiar
v.
Tirunagavalli

An obligation to grant remission of revenue can only be moral but not legal.

A provision for remission of rent according to the discretion of the landlord can only be a moral obligation not enforceable in Civil Courts.

Appeals under S. 15 of the Letters Patent presented from the judgment of His Lordship the Chief Justice, dated 20th February 1902 in C. R. P. Nos. 190 and 225 of 1901 presented against the decrees of the Court of the District Munsif at Negapatam in S. C. S. Nos. 92 and 94 of 1901 respectively.

* L. P. A. No. 9 of 1902.

2nd October 1902.

Alagappa
Chettiar
v.
Tirunagavalli

A temple trustee as landlord sued for rent. Them uchilika on which the suit was based was executed by the tenant to the Collector for the East India Company who was also the trustee of the temple to which Swamibhogam was to be paid. There was a clause in the muchilika which ran as follows "if perhaps during any fusli loss be caused by an act of God, by flood, by drought, the same Thaladi thirwa and Thunduvaram shall be remitted by the Sircar * * * at their discretion." The clause evidently applied to Swamibhogam. The District Munsif himself exercised the discretion and remitted half the Swamibhogam, considering there was some loss of crop by *vis major*. On revision the Chief Justice held that the District Munsif was right and that the discretion to be exercised by the landlord was a *reasonable* discretion and *should* be exercised when there were sufficient reasons for the same. Hence the appeal under the Letters Patent.

V. Krishnaswami Aiyar for appellant.

P. S. Sivaswami Aiyar for 1st respondent.

The Court delivered the following

JUDGMENT :—We are not by any means clear that the words in Exhibit No. I regarding remission refer to the rents payable to the temple. We are inclined to think that they refer only to the revenue payable to Government, but even if they refer also to the rents payable to the temple, we do not think that they are sufficient to create a legal obligation. The matter is left entirely to the decision of the Collector, and cannot be enforced by the Courts. The obligation, if it exists, is on the same footing as the obligation to grant a remission of revenue, and it cannot be contended that such obligation is one that can be enforced by the Courts it being regarded only as a moral and not a legal obligation.

We must allow the appeal with costs throughout and give judgment for the plaintiff against the 1st defendant as prayed for with interest at 6 per cent. per annum from date of plaint.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Ramalingam Chettiar

...

Appellant*

(Defendant).

v.

Ramasami Aiyar and others

...

...

Respondents

(Plaintiffs 1 to 3).

Tiruppani cess—Voluntary payment for a number of years—Implied contract.

Ramalingam

Chettiar

v.

Ramasami

Aiyar.

Where a cess is unconnected with a tenant's holding and is essentially of a voluntary character, its continuous payment for a number of years is not a ground for implying that there was a legal contract or obligation to continue to pay it.

A 'tiruppani' cess is of such a character.

Second appeal from the decree of the District Court of Tinnevely in A. S. No. 168 of 1900, presented against the decree of the Court of the District Munsif of Srivilliputtur in O. S. No. 306 of 1899.

K. Ramachandra Aiyar for P. R. Sundara Aiyar for appellant.

K. P. Govinda Menon for M. R. Ramakrishna Aiyar for 1st respondent.

The Court delivered the following

JUDGMENT :—The District Judge when he says that there was an implied contract to pay *tiruppani* cess which was voluntary and unconnected with the holding, as well as the other cesses which were connected with the holding evidently did not mean to say that there was a legally enforceable contract, for he held that the *tiruppani* cess¹ was not legally enforceable. He appears only to have meant that the period for which the cess had been paid was long enough to support an implied contract if the cess was of such a character that a contract to pay it might reasonably and properly be implied.

The cess is one of an essentially voluntary character, and therefore its payment for a number of years cannot be a ground for implying that there was a legal contract or obligation to continue to pay it.

The second appeal is dismissed with costs.

* S. A. No. 948 of 1901.

20th November 1902.

1. *Tiruppani* means service of God and the cess was levied for the purpose of repairing certain buildings dedicated for charitable purposes.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies and Mr. Justice Benson.

Suryaprakasa Row ... Appellant* (*Legal representative of the original Plaintiff.*)
v.

The Secretary of State for India

in Council ... Respondent (*Defendant*).

Suryaprakasa Row *Madras Act II of 1864, S. 59—Karnam fees—Suit for wrongful levy of such fees—Limitation.*

The Secretary of State for India. A suit against the Government for the recovery of money alleged to have been wrongfully or illegally levied under Madras Act II of 1864 from the plaintiff by the Government for fees said to be due to a Village Karnam must be brought within six months of the date when the cause of action arose under S. 59, Madras Act II of 1864.

Second appeal from the decree of the District Court of Kistna in A. S. No. 154 of 1900, presented against the decree of the Court of the District Munsif of Masulipatam in O. S. No. 223 of 1897.

This was a suit by the plaintiff to recover a certain sum of money alleged to have been illegally collected from him (as fees due to a karnam) by the Revenue authorities. His case was that he was an Agraharamdar and as such was entitled to appoint his own Karnam, that he did so and that the Government wrongfully appointed another and collected the fees from the plaintiff under S. 52 of Act II of 1864 (Madras). The District Munsif gave a decree, but the District Judge reversed it on the ground that the plaintiff's claim was barred under S. 59 of Act II of 1864 on the ground that the suit was brought more than 6 months after the cause of action arose. Hence this second appeal.

R. Subrahmanya Aiyar for *Rajah T. Rama Row* for appellant.
The Government Pleader for respondent.

The Court delivered the following

JUDGMENT:—The suit is one brought to recover money alleged to have been illegally levied by Government on account of fees said to be due to the karnam of the village. The fees were levied under Madras Act II of 1864, and the plaintiff who is aggrieved by the action taken under that Act is required by section 59 to bring his suit within six months of the date when the cause of action arose. The present suit is admittedly not brought within that time and is therefore barred and it is unnecessary to go into the merits.

We dismiss the second appeal with costs.

* S. A. No. 745 of 1901.

6th March 1906.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(FROM THE CHIEF COURT OF THE PUNJAB).

Present :—Lord Macnaghten, Lord Robertson, Sir Andrew
Scoble and Sir Arthur Wilson.

Rani Bhagwan Kuar... ... *Appellant**

v.

Bose and others *Respondents.*

Probate Act V of 1881, S. 2—Indian Succession Act, S. 331—Sikh a Hindu—Jains and Sikhs governed by Hindu Law—Lapse from Orthodox practice—Hindu becoming a Brahmo.

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Jains are governed by the Hindu Law in the absence of custom varying that law.

Sikhs are governed by the Hindu Law, and Courts applied such law to them because they were included under the term "Hindu" within the meaning of the Regulations which secured to the people of India the maintenance of their ancient laws, not because of the alternative rule of justice, equity and good conscience.

The term "Hindu" in S. 331 of the Indian Succession Act X of 1865 includes a person who is a Sikh.

The Probate Act, V of 1881, is a Procedure Act and a "Sikh" is a Hindu within the meaning of the said Act, S. 2.

A Sikh or a Hindu by becoming a Brahmo does not necessarily cease to belong to the community in which he is born.

A lapse from the standard orthodox practice binding upon a Sikh or Hindu in matters of diet and ceremonial observance cannot have the effect of excluding from the category of Hindu in Act V of 1881 one who was born within it and who never became otherwise separated from the religious communion in which he was born.

Their Lordships' Judgment was delivered by

SIR ARTHUR WILSON :—Sirdar Dyal Singh, a wealthy gentleman who resided at Lahore, died on the 9th September 1898, having executed a Will on the 15th June 1895, by which he appointed the respondents, his executors, and made various dispositions of his property which need not now be considered. The testator was by birth a Sikh.

On the 18th February 1899 the executors applied to the Chief Court of the Punjab for Probate of the Will under the Probate and Administration (Act V) of 1881. Several persons opposed the grant, amongst whom was the present appellant, the testator's widow. She raised a variety of objections of which it is only

* 5th August 1903.

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necessary to notice two. She alleged, first, that the application was not maintainable under the Act of 1881, as the deceased was not a Hindu within the meaning of the Act at the time of his death or at the time of the making of his Will. Secondly, she denied the due execution of the Will, and alleged that there were alterations and interlineations which affected the right to probate. Issues were settled raising these questions. The Chief Court decided against the appellant on both points, and granted probate to the executors. Against that decision the present appeal has been brought.

The appellant's first objection resolved itself in argument into three. First, that the testator as a Sikh was not included in the term "Hindu," as used in the Act of 1881. Secondly, that assuming Sikhs to be Hindus within the meaning of the Act, the testator had before his death ceased to be a Sikh and become a member of the Brahmo Somaj, and so was not a Hindu. Thirdly, that certain personal habits of the testator in respect of diet and otherwise were inconsistent with Hindu or Sikh orthodoxy, and so excluded him from the term Hindu in the Act. Their Lordships will deal with these several points in their order.

A long series of legislative provisions have been enacted for the purpose of securing to the people of India the maintenance of their ancient law, amongst others in matters of inheritance and succession, and many minor enactments have been passed to facilitate the administration of the laws so preserved. The object and principle of this legislation has been throughout to enable the people of various races and creeds in India to live under the law to which they and their fathers had been accustomed, and to which they were bound by so many ties.

The framers of the earlier Acts, regulations, and charters had a less detailed acquaintance than we have now with the diversities of creed and of religious law existing in India. They were familiar with two great classes, Muhammadans and Hindus, each with its own law bound up with its own religion. They thought no doubt that they were sufficiently providing for the case by securing to Muhammadans the Muhammadan law, and to Hindus (or Gentus, as they were sometimes called) the Hindu law. In process of time it became more and more clearly understood that there were more

forms than one of the Muhammadan law, and more forms than one of the Hindu law, and the Courts, acting in the spirit which prompted the legislation, have applied the law of each school to the people whose ancestral law it was. In the same way it came to be known that there were religious bodies in India which had, at various periods and under various circumstances, developed out of, or split off from, the Hindu system, but whose members have nevertheless continued to live under Hindu law. Of these the Jainas and the Sikhs are conspicuous examples. Their cases had to be considered by the Courts, and in dealing with them a liberal construction was always placed upon the enactments by which Muhammadans and Hindus were secured in the enjoyment of their own laws.

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As to Jainas the Courts in India always applied the Hindu law generally to their cases in the absence of custom varying that law. This course was approved by this Board in *Sheo Singh Rai v. Mussumut Dakho*¹, and *Chotay Lall v. Chunnoo Lall*².

The case of the Sikhs came up for consideration for the first time, so far as their Lordships are aware, before the Supreme Court in Calcutta, in *Doe dem. Kissenchunder Shaw v. Baidam Beebee*, reported briefly from Sir E. Hyde East's notes in 2 Morley's Digest 22. In the previous volume of the same work (at p. clxxvii) a statement is quoted, made to a Parliamentary Committee in 1830 by Sir E. Hyde East, by whose Court the case just mentioned was decided. He said of that case: "The difficulty was gotten over by considering the Sikhs as a sect of Gentoos or Hindoos, of whom they were a dissenting branch."

From that time to the present the same view has been acted upon by the Indian Courts, and particularly (as has been pointed out by the learned Judges of the Chief Court in the present case) by the Courts of the Punjab, which is the real home of the Sikhs.

An ingenious argument was addressed to their Lordships upon this point. It was suggested that the application of Hindu law to the Sikh community was not based upon their being Hindus within the meaning of the early legislation bearing on the subject, but upon the alternative rule of justice, equity, and good consci-

1. 1 L. R., 1 A. 618; L. R., 5 I. A. 37. 2. 1 L. R., 4 C. 744; L. R., 6 I. A. 15.

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ence also sanctioned by that legislation in accordance with the principles laid down in *Abraham v. Abraham*¹ as applicable to converts from Hinduism to Christianity. As to this it seems sufficient to say that the ground of decision has never been that which is now suggested, but that the decisions have been based upon the view that Sikhs were included under the term Hindu.

To recur to the Acts of the Legislature, there have undoubtedly been modern instances in which, in the light of more complete knowledge, the various creeds of India have been more accurately or at least more carefully distinguished than they once were. Their Lordships' attention was called to several instances of this. The Hindu Wills Act, 1870 (No. XXI of 1870), an Act not in force in the Punjab, is made applicable to the Will of any Hindu, Jaina, Sikh, or Buddhist. Act III of 1872, passed to provide a form of marriage for persons not professing the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh, or Jaina religion, enumerates those religions accordingly. And the Married Women's Property Act (III of 1874) similarly distinguishes Hindus, Muhammadans, Buddhists, Sikhs, and Jainas.

But though in some modern Acts, religions are thus distinguished with more detail than was formerly used, in others the old form of language is used, and with the old generality of meaning. An instructive example is to be found in the Punjab Laws Act (IV of 1872), S. 5 of which enacts that in questions regarding succession, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be (a) any special custom applicable to the parties concerned; "(b) the Muhammadan law in cases in which the parties are Muhammadans, and the Hindu law in cases in which the parties are Hindus." It is impossible to suppose that the Legislature in laying down the law for the Punjab, while providing a rule of decision for Muhammadans and Hindus, should have overlooked the case of the Sikhs, or left them dependent only upon such customs as they might be able to prove. It seems clear that the Legislature used the old phraseology in the old sense, and included Sikhs under the term Hindu.

1. 9 M. L. A. 195.

The evidence in the present case makes it clear, and it is satisfactory to find it so, that in including Sikhs under the term Hindus, Legislators and Judges have acted quite in accordance with popular usage. Witnesses on one side and on the other, Sikhs and others than Sikhs, speak of Sikhs as Hindus. And in an official publication of high authority, the General Report on the Census of India, 1891, at p. 164, it is said that a Sikh is "generally called a Hindu in common parlance."

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These considerations naturally lead up to an examination of the particular legislative enactments which their Lordships have to construe.

The Indian Succession Act (X of 1865) laid down the law as to inheritance and testamentary disposition in British India for all classes of persons who were not exempted from its provisions. The Act is based upon English Law, and for the most part it expresses the rules of that law. It would obviously have been absurd to apply such an Act to the people of India generally, whose laws were wholly different from the English. And accordingly in S. 331 it is declared that :—"The provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Muhammadan or Buddhist." S. 332 further gave power to the Government of India to exempt any race, sect, or tribe from the operation of the Act; but no exemption affecting the present question has been made under this section. It appears to their Lordships to be clear that in S. 331 the term Hindu is used in the same wide sense as in earlier enactments, and includes Sikhs. If it be not so, then Sikhs were, and are, in matters of inheritance, governed by the Succession Act, an Act based upon, and in the main embodying, the English law; and it could not be seriously suggested that such was the intention of the Legislature.

The Probate and Administration Act, 1881 (V of that year), which is mainly a procedure Act, commences with a preamble reciting that "it is expedient to provide for the grant of probate of wills and letters of administration to the estates of deceased persons in cases to which the Indian Succession Act, 1865, does not apply." In S. 2 it is said that "chapters II to XIII (both inclusive) of this Act shall apply in the case of every Hindu, Muhammadan, Buddhist, and person exempted under S. 332 of

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the Indian Succession Act, 1865"; and the chapters there mentioned include the provisions for the grant of probate of Wills.

Their Lordships think it clear that the term Hindu in this Act is used in the same sense as in the Succession Act, and they agree with the Chief Court in holding that a Sikh is included under that term.

The second form in which the objection to the grant of probate was put was that, assuming the testator as a Sikh to have been originally a Hindu within the meaning of the Probate and Administration Act, he had ceased to be either a Sikh or a Hindu by becoming a member of another religious body, the Brahmo Samaj. The learned Judges of the Chief Court examined the literature bearing upon the Brahmo Society; they had before them much important evidence with reference to the Brahmos and the relation of their principles and their organisation to the Hindu system; and they came to the conclusion that a Sikh or Hindu by becoming a Brahmo did not necessarily cease to belong to the community in which he was born. They also found on the evidence that the testator never became a professed Brahmo at all. In both these conclusions their Lordships agree.

It was next objected that in matters of diet and ceremonial observance the testator had departed so far from the standard of orthodoxy binding upon him as a Hindu or a Sikh as to exclude him from the term Hindu in the Act in question. Their Lordships agree with the learned Judges of the Chief Court in thinking that such lapses from orthodox practice, assuming them to be established, could not have the effect of excluding from the category of Hindu in the Act one who was born within it, and who never became otherwise separated from the religious communion in which he was born.

There remains one further point to be disposed of. It was contended for the appellant that the Will admitted to probate had not been duly executed in its present form. The mode in which the objection arose is somewhat peculiar. The Will is signed by the testator at the end of it, and attested by two European officers, Dr. Clark, who was at the time the Civil Surgeon, and Colonel

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Marshall, who was at the time the Divisional and Sessions Judge of Lahore, the attestation clause being in the completest possible form. The Will, which is an English document, and which their Lordships have had an opportunity of examining, is also signed at the bottom of each page by the testator and by the attesting witnesses. It was deposited in the office of the Registrar a few days after its execution, and there it remained till after the death of the testator more than three years later. The application for probate fully complied with the requirements of the law as expressed in Ss. 62 and 67 of the Probate and Administration Act; it was verified by the executors, and there was appended to it a declaration of due execution by Clark, one of the attesting witnesses. If this had been all, there would have been quite sufficient to warrant the issue of probate. The appellant, however, in opposition to the grant, disputed the due execution of the Will, and alleged that there were alterations and interlineations in it which affected the grant of probate. This the executors denied.

At the trial Clark was called as a witness in Court. In examination-in-chief he spoke to the execution of the Will with little recollection on the subject, and relying mainly upon his attestation. In cross-examination he said: "I have a vague recollection that the Sardar said something had been omitted which would be filled in afterwards about investments or something of that sort. There is a sort of picture in my mind of a page partly left blank." Further on he said: "My recollection as to the blank page was that it was blank at the bottom. It was not the last page according to my recollection. I noticed it as the pages were being turned over to be signed."

Marshall, the other attesting witness, was examined in England on commission. In chief he spoke pretty clearly to the execution of the Will. In cross-examination he said: "To the best of my recollection, a portion of one of the pages, about the middle of the document, was left blank, that is, was not written upon to the foot of the page, as they now all are; and the Sardar gave some explanation as to some details being required. I did not read the Will." Question: "By details being required did you not understand that these details would subsequently be filled into

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the Will?" Answer: "I presumed such would be the case. I cannot say to what these details referred. I knew nothing of the contents of the Will. I only witnessed the Sardar's signature." (Witness is shown paragraph 25 of the Will, page 11, and says with regard to the words "Mrs. L. Catherine Gill" appearing there, that he cannot say whether these words were present when he signed his name at the foot of the page.) Question: "Can you state any reasons "why the Sardar gave the explanation that there were some details that would be subsequently filled in?" Answer: "Because, as far as I recollect, there was a portion of a page which had not been written upon."

Re-examined he said :—

"I cannot indicate in any way the page of this document which had not been written upon down to the bottom. I cannot say upon looking through the Will (as I am not an expert) which paragraphs were written before or after my signatures. I cannot state exactly the length of the blank space. I cannot state what were the number of lines left blank on the unfinished page."

The impression then upon the minds of these two witnesses is that some one of the pages in the middle of the Will was not written on to the bottom. The learned Judges of the Chief Court, dealing with this part of the case, showed that the impression of these witnesses could not be correct, because there is no page of the Will in which a sentence ends with the page and in which there could have been such a blank as the witnesses picture to themselves. And for this and other weighty reasons the learned Judges considered that the witnesses must have been mistaken in their impression.

Their Lordships have examined the Will for themselves and they entirely concur with the Chief Court in rejecting the suggestion of the supposed blank in the Will at the time of its execution.

For these reasons, their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs of the appeal.

Solicitors : *Messrs. T. L. Wilson & Co.* for appellant.

Solicitor : *Mr. W. W. Boz* for respondents.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(FROM THE CALCUTTA HIGH COURT).

Present :—Lord Davey, Lord Robertson, Sir Andrew Scoble
and Sir Arthur Wilson.

Webb and another *Appellants.**

v.

Macpherson *Respondent.*

Transfer of Property Act, S. 55 (4)—Sale of estate—Unpaid purchase-money—Vendor's right to a charge—Nature and origin of vendor's lien in a court of equity—Contract to the contrary—Chargee in possession giving up possession—Effect of agreement to pay in instalment—Sale for a sum of money and sale for a covenant to pay—Apportionment—Certificate granting leave to appeal to Privy Council—Civil Procedure Code, Ss. 595 (c) and 600.

Webb
v.
Macpherson.

Where a vendor of immoveable property entitled to a lien for the unpaid purchase-money enters into possession of the property he holds the same as a charge on the property and having an interest in its preservation.

Under S. 55 (4) of the Transfer of Property Act a vendor of immoveable property is entitled to a statutory right to a charge upon the property in the hands of the purchaser or those claiming under him for unpaid purchase money unless it can be shown that either by express terms or by necessary implication there is a clear contract excluding the right to such charge.

A mortgagee or chargee who is in possession of an estate as such and gives up possession to the person entitled to the same subject to his charge upon payment of what is then due to him is not precluded from afterwards asserting his right against the estate for further instalments or payments becoming due to him.

The Law of India, speaking broadly, knows nothing of the distinction between legal and equitable property in the sense in which that was understood when equity was administered by the Court of Chancery in England.

The charge, which a vendor obtains under the Transfer of Property Act, is a statutory charge and different in its origin and nature from the vendor's lien created by the courts of equity to an unpaid vendor.

The vendor's lien was a creation of the Court of Equity and could be modified according to the circumstances of the case by the Court of Equity.

The statutory charge given to the vendor under the Transfer of Property Act can only be excluded by contract, and English cases can be useful in such a case only for the purpose of illustration.

* 1st July 1908.

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Such a charge is not excluded by a mere personal contract to defer payment of a portion of the purchase-money or to take the purchase-money by instalments or by any contract, covenant or agreement with respect to the purchase-money which is not inconsistent with the continuance of the charge.

An agreement upon the part of the purchaser to pay the purchase-money in certain instalments with interest is not "a contract to the contrary" within the meaning of S. 55 (4), Transfer of Property Act, and is not inconsistent with the existence of a charge to the vendor for the amount of the instalments and interest becoming due from time to time.

There is a distinction founded upon principle and authority between a conveyance or sale in consideration of a *covenant* to pay a sum of money in the future and a sale in consideration of *money* which the purchaser covenants to pay. In the former case there is "a contract to the contrary" expressed in the conveyance itself which excludes the statutory charge on the property.

The vendor has a statutory right of charge upon the whole estate sold by him and for the whole balance due to him irrespective of the fact that a portion of the estate was subsequently sold by the purchaser to a third person, and it is not open to a court in a suit by the chargee to enforce his charge to apportion the amount due under the charge between the original purchaser and his assignee.

Where the amount or value of the suit and of the matter in appeal to the Privy Council was more than Rs. 10,000 and the decree of the High Court appealed from affirmed the decision of the court immediately below the High Court which passed the decree and a certificate is given for leave to appeal to the Privy Council stating that the case was otherwise a fit one for His Majesty in Council such a certificate is correct in form and satisfies the provisions of the law.

Such certificate is given pursuant to S. 595, Cl. (c) and the latter alternative of S. 600, C. P. C.

*Rajah Tussaduq Rasul Khan v. Manika Chand*¹ distinguished.

Their Lordships' Judgment was delivered by

LORD DAVEY :—The appellants are the executors of a gentleman named Lloyd, who was at one time the owner of some property at Darjeeling. By an indenture, dated the 17th July 1892, Mr. Lloyd conveyed part of that property—a tea garden of some 800 acres, called the Gopaldhara Tea Estate—to a person named Tucker. The conveyance contains a recital that "the vendor has agreed with the purchaser for the absolute sale to him of the hereditaments intended to be hereby granted * * * free from encumbrances in consideration of the sum of Rs. 81,210, of which Rs. 30,000 is to be paid on or before the execution of these presents, and the balance of Rs. 51,210 with interest is to be secured by the formal under-

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“taking of the purchaser”. It then goes on to recite that “im-
 mediately before the execution of these presents the purchaser has
 executed in favour of the vendor a formal undertaking for the pay-
 ment to the vendor of the sum of Rs. 51,210 with interest after the
 rate at the time and in the manner therein mentioned”. The
 operative part of the covenant declares that “in pursuance of the
 said agreement and in consideration of the sum of Rs. 30,000 at or
 before the execution of these presents paid by the purchaser to the
 vendor,” (the receipt of which was thereby acknowledged), “and
 in consideration of the sum of Rs. 51,210 secured by such under-
 taking as aforesaid the vendor doth hereby grant unto the purchaser”
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By a memorandum which is dated the 3rd August 1892 and is
 the “undertaking” referred to in the conveyance as having been
 executed—it was in fact executed a few days after the conveyance.
 Mr. Tucker, the purchaser, contracted to pay to Mr. Lloyd, his
 executors etc., the sum of Rs. 51,210 by yearly instalments (until
 the final payment) of not less than 1,000 l., and with each instal-
 ment to pay interest on the entire amount then due. Three instal-
 ments of 1,000 l each being roughly equivalent to Rs. 51,210, the
 contract was one to pay the balance of the purchase money after
 payment of the Rs. 30,000 paid on the execution of the conveyance,
 in three annual instalments of 1,000 l each, with interest in the
 meantime.

It appears from documents in the case that Mr. Tucker, the
 purchaser, was either the agent of, or a trustee for, one Curphey,
 who was at that time a minor, Mr. Tucker being his guardian; but
 their Lordships agree with the High Court that that makes no real
 difference in the consideration of the case; for if Mr. Tucker was
 a *prete-nom* for Mr. Curphey, and he was equally so as regards the
 contemporary memorandum, and if, on the other hand, Mr. Tucker
 was the person to whom the legal estate was granted on behalf of
 Mr. Curphey, he was the person who entered into the obligation
 and defined the terms upon which the purchase money should be
 paid. For the present purpose it is utterly immaterial whether
 Mr. Tucker or Mr. Curphey was the real purchaser, because the
 only question on the present occasion is whether there is a charge
 for the balance of the purchase money which has not been paid.

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It appears that Mr. Curphey entered into possession of the garden, and did some work upon it, but apparently either from want of skill or want of capital, or want of attention, he was not very successful. He seems to have fallen into arrears with his payments, and in the latter part of 1893 Mr. Lloyd determined to enter into possession, in order, as he expresses it himself, to save the garden from ruin. In a letter of the 17th November 1893, addressed to Messrs. Sanderson and Co., who had acted as his representatives, he says:—"It is a pity to let the garden go to the dogs; it is true keeping these 40 coolies on the place is not much, but it is all that I can do. Had I known the coolies were leaving, I would have stepped in before. Mr. R. Tucker, junior, does not seem quite successful in his arrangements for paying me, and possibly the best way out of the mess would be for me to refund the money and take back the garden. Mr. Curphey has sold timber off the place * * * * *

The parties, however, did not accept Mr. Lloyd's proposal to refund the money and take the property back, but they allowed him to enter into possession in order to save the property from ruin. In what character did he enter into possession? It was as chargee on the property, and therefore having an interest in its preservation that he entered into possession. At the end of that year the respondent, Mr. Macpherson, appears upon the scene. In a letter to Mr. Lloyd, dated the 20th December 1893, Mr. Macpherson, says:—"Dear Mr. Lloyd, yours of the 29th instant to hand. My reasons for offering you two-thirds Gopaldhara were because I understood Curphey held one-third, and that you were on the look out for a banker for the balance. I am quite prepared to take the whole of Gopaldhara should you feel disposed to let me have it." In the result Mr. Macpherson purchased three-fourths of the property from Mr. Tucker. There appears to have been some misapprehension about the title, but on being informed of the true state of the case that the property belonged to Mr. Tucker, he purchased three-fourths of it from Mr. Tucker, and in the commencement of the following year he settled with Mr. Lloyd. It is unnecessary to refer to all the letters which led up to the settlement, and it is sufficient to say that Mr. Macpherson wrote to Mr. Lloyd a letter, dated the 10th March 1894, showing what was

due both for the instalment of the purchase-money which had become due on the 1st July 1893, and also for Mr. Lloyd's expenditure on what was called "garden account" or "cultivation account," together with interest on both those sums, the total balance due to Mr. Lloyd on the 31st December 1893 being Rs. 29,115-6-8. After some correspondence Mr. Lloyd agreed to take Rs. 29,000 in discharge of what was due to him as on the 31st, December, 1893, and a sum of Rs. 1,744-5-0 on account of the "cultivation account" from that date up to the time when Mr. Macpherson was let into possession. Thereupon Mr. Macpherson took possession and paid his money. About this time viz., on the 9th July 1894, Mr. Lloyd wrote to Mr. Macpherson with reference to a small sum remaining due. He says :—" Why not pay me that Rs. 286-8-0 you owe me for walling and lime and cement. What is the use of your saying you will ask Mr. Tucker to pay it. Do so if you like, but in the meantime you should pay me. You promised to pay me up if I gave over the garden to you, and on that faith I let you have it. Now your great heart baggles at a small item, the last, be brave and honest and stump up." It is suggested that that means that it was Mr. Lloyd's intention to relieve the estate from the payment of anything on account of subsequent instalments of the purchase-money, because he speaks of his "great heart baggling at a small item, the last." Their Lordships think that Counsel for the appellants put the right interpretation on that letter, when he suggested that what Mr. Lloyd is speaking of is the "garden account." The Rs. 286-8-0, were due on the "garden account" and he speaks of them as the last item due on that account. His letter has no relation to the payment of the instalment of purchase-money which had then just become due on the 1st July, but is written altogether *alio intuitu*. Both at their Lordships' Bar, and before the Appellate Court in India, the letter has been much relied on as evidence that Mr. Lloyd referred to his statutory charge for the unpaid purchase-money, but their Lordships are unable to regard the letter as having any effect of that kind. Mr. Lloyd died on the 15th January 1896, and the present appellants are his representatives. They commenced an action on the 28th June 1898 against Mr. Macpherson and two other defendants. As already stated, Mr. Macpherson was the purchaser of three fourths of the estate from Mr. Tucker, and the other two defendants

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were judgment-creditors of Mr. Tucker's having rights against the remaining fourth. The object of the action was to have it declared that Mr. Lloyd was entitled to a charge on the estate for the balance of the purchase-money due to him together with the stipulated interest. S. 55 (4) of the Transfer of Property Act (No. IV of 1882) provides that:—"In the absence of a contract to the contrary The seller is entitled, where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part". Mr. Lloyd's executors therefore had a statutory right to a charge upon the property in the hands of Mr. Tucker, and those claiming under Mr. Tucker, unless it can be shown that there was a clear contract to the contrary between the parties. It was contended, first, that the conveyance of July 1892, and the accompanying memorandum of the 3rd August 1892, did contain—the respondent must put it as high as this—either by express terms or necessary implication, some contract which excluded the right given by the statute to the vendor; and, secondly, that if that was not so, still Mr. Lloyd, by giving up possession to Mr. Macpherson on the terms already mentioned in March 1894, had abandoned whatever right he may have had up to that time to any charge on the estate. To take the second point first, there is no ground whatever for saying that a mortgagee or chargee who is in possession of an estate as such, and gives up possession to a person entitled to it subject to his charge upon payment of what is then due to him, is precluded from afterwards asserting his right against the estate when further instalments, or further payments, become due to him. Such a proposition was not indeed maintained by Counsel, but it was argued that the letters which passed between Mr. Macpherson and Mr. Lloyd at that time amounted to an abandonment by Mr. Lloyd of any rights he may have had. That point has already been dealt with, and their lordships will only say that an examination of the contents of those letters clearly shows that they do not amount to any abandonment of any rights of charge or lien which Mr. Lloyd then had upon the estate.

With reference to the conveyance a number of English cases were cited. No doubt English cases might be useful for the pur-

pose of illustration, but it must be pointed out that the charge which the vendor obtains under the Transfer of Property Act is different in its origin and nature from the vendor's lien given by the Courts of equity to an unpaid vendor. That lien was a creation of the Court of equity and could be modified to the circumstances of the case by the Court of equity. But in the present case there is a statutory charge.

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The law of India speaking broadly, knows nothing of the distinction between legal and equitable property in the sense in which that was understood when equity was administered by the Court of Chancery in England, and the Transfer of Property Act gives a statutory charge upon the estate to an unpaid vendor unless it be excluded by contract. Such a charge therefore stands in quite a different position from a vendor's lien. You have to find something, either express contract, or at least something from which it is a necessary implication that such a contract exists, in order to exclude the charge given by the statute. In their Lordships' opinion there is no ground whatever for saying that that charge is excluded by a mere personal contract to defer payment of a portion of the purchase money, or to take the purchase money by instalments, nor is it in their Lordships' opinion, excluded by any contract, covenant, or agreement with respect to the purchase-money which is not inconsistent with the continuance of the charge. It is quite clear that the agreement of Mr. Tucker, the purchaser, to pay the balance of the purchase-money (Rs. 51,210) in three annual instalments with interest was, in no way, inconsistent with the existence of a charge to the vendor for the amount of the instalments with interest to become due from time to time.

But there is another point which seems to have found favour with the High Court in Bengal. It was said that no charge ever arose, because the purchase was not in consideration of a sum of money, part of which was paid down and the payment of the balance of which was deferred, but it was a purchase in consideration of a particular covenant. There is no doubt, both on principle and authority, that a conveyance or sale in consideration of a covenant to pay a sum of money in the future is different

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from a sale in consideration of money which the purchaser covenants to pay. The distinction may seem fine, but it is a real distinction, and it is one, which, if made out, might have had the effect which the High Court have given to it. But is that the form of this conveyance? The conveyance as already pointed out is made in consideration of a sum of money. The agreement is expressed to be an agreement to sell for a sum of money of which Rs. 30,000 is to be paid, and the rest is to be secured by an instrument of even date, and the operative part of the conveyance is in consideration of Rs. 30,000 paid down, and of a balance which is identified as being the sum secured by the agreement. Their Lordships therefore think that that point also fails, and that there is no contract excluding the operation of the charge.

The Court of the Subordinate Judge seems to have apportioned the charge between three-fourths of the estate purchased by Mr. Macpherson, and the one-fourth left in Mr. Tucker. It is perhaps immaterial for the present purposes but that apportionment is not strictly correct, as Mr. Lloyd's rights could not be affected by the mode in which Mr. Tucker chose to deal with the property, and Mr. Lloyd's charge under the statute was a charge on the whole property for the whole amount of the balance due to him into whosoever hands it came through Mr. Tucker; but for the present purpose it is not material to consider that at greater length, as there was no appeal to the High Court from the decree of the Subordinate Judge so far as it affects the defendants other than Macpherson.

Their Lordships, will therefore, humbly advise his Majesty that the appeal should be allowed, that the decrees of the High Court and of the Subordinate Judge, so far as they dismiss the suit against the present respondent, should be reversed with costs, and that instead thereof it should be declared that the appellants are entitled to a charge on the Gopaldhara Tea Estate for the unpaid balance of the purchase-money and interest, and that the case ought to be remitted with this declaration to the High Court to take the necessary accounts. The appellants obtained a decree against the other two defendants, who were sued in respect of the fourth share which Mr. Macpherson had not then bought, and a certain sum was apportioned by the Subordi-

nate Judge on that fourth share. They (the appellants) may or may not have received something in respect of that charge, so that in taking the account of what is due to them for principal, interest and costs, regard must be had to so much of the decree of the Subordinate Judge as was not appealed against, and their Lordships will so advise his Majesty accordingly. Their Lordships put it in that general way purposely, because they do not wish the High Court to be precluded from dealing with the matter in such a way as is right; that is to say, the High Court may either take the amount actually received by the appellants from those two defendants under the decree, or they may think it a case in which they ought to charge the appellants with the amount which they might have received under the decree in relief of Mr. Macpherson.

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A preliminary objection was made by the respondent to the hearing of the appeal founded on the form of the certificate of the High Court. The certificate is that the case is a fit one for appeal to His Majesty in Council, and their Lordships understand it to be given pursuant, S. 595(c) and the latter alternative of S. 600 of the Code of Civil Procedure, and they think that it properly follows the words of the Act and is correct in form. In the case cited by Mr. Bonnerjee (*Rajah Tassaduq Rasul Khan v. Manikchund*¹) the certificate purported to be given under S. 596, but instead of finding in the form required by S. 600 that as regards its nature the case fulfilled the requirements of S. 596, found specially that the decision of the Appeal Court differed from that of the court below. This was found to be erroneous owing to the Judge having placed a wrong meaning on the word "decision." It was on that ground alone that the certificate was held to be defective.

The respondent will pay the appellant's costs of this appeal.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Chief Justice*,
Mr. Justice Subrahmania Aiyar, Mr. Justice Benson and
Mr. Justice Bhashyam Aiyangar.

In Appeal No. 152 of 1900.

Karuppai Nachiar ... Appellant* (3rd Defendant).
v.

Sankaranarayanan Chetti and
others ... Respondents (*Plaintiffs 1 to
6 and Defendants 1, 2, 5
to 10*).

In Appeal No. 186 of 1900.

Sangiliveera Nachiar (deceased)
and others ... Appellants (4th Defendant
and her legal representa-
v. tive).

Sankaranarayana Chetti and
others ... Respondents (*Plaintiffs 1
to 6 and Defendants 1 and
2*).

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Hindu Law—Maternal uncle's property—Sister's sons members of a joint family. Nature of estate taken by sister's sons—Rule of survivorship—Tenants in common—Mother's stridhanam—Sons taking as tenants in common.

Sons take the property of the mother as tenants in common and not as coparceners with rights of survivorship.

The definitions of obstructed and unobstructed heritage given by the Mitakshara refer in terms only to the heritage of the property of a male.

The estate of a maternal uncle devolves upon his nephews who, at the time of the uncle's death, are members of an undivided family, not as joint tenants, but as tenants in common or as co-owners without benefit of survivorship.

The *Jagampet case** considered and explained.

In Hindu Law "Ancestor" does not mean 'propositus,' but a direct ascendant in the paternal or the maternal line.

Daughter's sons living together as coparceners take the estate of their maternal grandfather as coparceners with rights of survivorship and on the property vesting in them their issue acquire a right by birth in such property.

* A. Nos. 152 and 186 of 1900 and S. A. No. 1338 of 1901.

8th April 1903.

1. I. L. R., 25 M. 678.

Appeals from the decree of the Subordinate Judge's Court of Madura (East) in O. S. No. 14 of 1899.

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These appeals coming on for hearing the Court (*Subrahmania Aiyar, J. and Davies, J.*) made the following

ORDER OF REFERENCE TO A FULL BENCH* :—One of the questions which arises for determination in this case is whether sons of a woman who succeed to her *stridhanam* and who are at the time the succession opens members of a joint family with their father take as joint tenants or as tenants in common.

This question is one of difficulty having regard to the recent decision of the Judicial Committee in the *Jagampet case*.¹ We, therefore, submit the question for the decision of the Full Bench.

In Second Appeal No. 1338 of 1901.

Nallapureddi Narasimha Reddi. Appellant (1st Defendant).
v.

Nallapureddi Mahalakshamma
and others ... Respondents (Plaintiffs and
Defendants 3 to 8).

Second appeal from the decree of the District Court of Nellore in A. S. No. 359 of 1899, presented against the decree of the Court of the District Munsif of Kavali in O. S. No. 776 of 1897.

This second appeal coming on for hearing the Court (*Benson, J. and Bhashyam Aiyangar, J.*) made the following

ORDER OF REFERENCE TO A FULL BENCH† :—This appeal has been argued on the footing that the deceased husband of the plaintiff, the first defendant's grandfather and the third defendant were undivided brothers when they inherited their maternal uncle's property and that no partition of the property was made between the three brothers. The question of law which has to be decided in the case is whether the plaintiff as the heir of her husband who died issueless is entitled to claim a third share in the property to which share her husband would have been entitled in his lifetime if a partition had been effected. It is argued on the strength of the recent decision of the Privy Council in the *Jagampet case*¹ that the maternal uncle's estate devolved upon his

* 19th March 1903.

† 20th March 1903.

1. I. L. R., 25 M. 678.

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sister's sons who were undivided when the inheritance opened as joint family property with the incident of the right of survivorship as it is understood under the Mitakshara law and that as the plaintiff's husband died without being divided from the 1st and 3rd defendants, his interest in the maternal uncle's estate passed by survivorship to the 1st and 2nd defendants and that therefore the plaintiff cannot maintain this suit. The question as to whether the recent ruling of the Privy Council can be extended to inheritance which devolves upon co-heirs other than grandsons by a daughter and as to how far that ruling is a binding authority in cases other than the succession of grandsons by a daughter to the maternal grandfather's property which was the only question actually decided by the Privy Council in that case is one of great importance and not free from difficulty. We refer the following question for the opinion of a Full Bench :—

Whether the estate of a male which devolves by inheritance on his sister's sons who at the time that the succession opens happen to be undivided members of one and the same joint Hindu family governed by the Mitakshara law but possessing no joint family property is taken by the brother as joint family property with the incident of survivorship as generally understood under the Mitakshara law or as co-heirs each entitled to an undivided one-third share which on his death without male issue devolves as his separate property on his widow.

C. R. Tiruvenkatachari and *S. Srinivasa Aiyangar* for appellants in A. Nos. 152 and 186 of 1900.

V. Krishnaswami Aiyar and *P. R. Sundara Aiyar* for respondents in A. Nos. 152 and 186 of 1900.

T. V. Seshagiri Aiyar for appellant in S. A. No. 1338 of 1901.

T. Ethiraja Mudaliar for respondents in S.A.No. 1338 of 1901.

OPINION :—These two references are so closely connected that it will be convenient to deal with them in one judgment.

The question referred for opinion in Appeal Suits Nos. 152 and 186 is whether the stridhanam property of a woman, which devolves on her sons, who with their father form an undivided Hindu family at the time of the mother's death, take as joint tenants with benefit of survivorship, or jointly or in common without benefit of survivorship.

The appellant's pleader contends that the recent ruling of the Privy Council in *Venkayamma Garu v. Venkataramanayamma Bahadur Garu*¹ on which the respondent mainly relies, does not apply to this case in which the co-heir inherited the stridhanam of their mother, and that there is no warrant under the Hindu Law of Mitakshara for holding that the stridhanam of a woman devolves upon her heirs, even if they be her male issue, as joint property with benefit of survivorship. We think that this contention is well founded. It is impossible to read the judgment of the Privy Council without coming to the conclusion that they guarded themselves against using language which would apply to the devolution of stridhanam property. After setting forth the facts of the case fully at the beginning of the judgment, they advert to the obscurity of the Mitakshara Law of Inheritance in the case of woman, and refer to their former decisions as conclusively establishing that property inherited by a widow from her husband or by a daughter from her father, is a limited and restricted estate only, and not stridhanam, and that upon her death the next heirs of the husband or father succeed thereto, and that, therefore, the co-heirs in the case before them on the death of their mother succeeded as heirs to their maternal grandfather. Their Lordships then propose the question "What then was the character of the property which they took?" and begin to answer it as follows:—"In the grandfather's hands it was separately acquired property. In the hands of the grand-sons it was ancestral property which had devolved on them under the ordinary law of inheritance." If their Lordships were of opinion that it would have made no difference whatever whether it was the mother's stridhanam which had devolved upon her sons, or the maternal grandfather's property which had devolved upon them, there was no object in making a pointed statement that the estate which a daughter inherits from her father is not her stridhanam, and that on her death her sons take it directly as heirs of their maternal grandfather, and that the estate, devolved on the grand-sons under the ordinary law of inheritance. The ordinary law of inheritance referred to is, there can be no doubt, the cardinal text of the Hindu Law of Inheritance to the separate property of a male, as opposed to the inheritance to the

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property of a hermit, dealt with separately by the author of the Mitakshara in Chap. 2, S. 8., and the devolution of the stridhanam property of a woman, also separately dealt with in Ch. 2, S. 11. We cannot accede to the suggestion of the respondent's pleader that "ordinary law of inheritance" is here used as distinguished from any mode of descent sanctioned by a special custom or usage opposed to the general law of inheritance, as laid down in the Mitakshara. Nor can we accede to the appellant's contention, founded upon the passage quoted and followed by their Lordships from the judgment in *Katama Nachiar v. The Rajah of Shivaganga*¹ that the ruling of the Privy Council under consideration cannot apply to the present case by reason that the undivided family in the present case consisted not only of the two undivided brothers, on whom the stridhanam devolved, but also of their father, for in the case before their Lordships there was in fact, as appears from the judgment of this Court as well as of the Privy Council, the very same joint family as in the present case, and the property devolved on the sons to the exclusion of their father.

As, then, the question before us is not concluded by the authority of the Privy Council ruling relied on by the respondent, we have to consider what is the rule of Hindu Law under the Mitakshara which is applicable. At the outset we may observe that the stridhanam property of a woman with a solitary exception which need not be referred to here, primarily descends upon her daughters, who either are, or will necessarily on marriage become, members of a different family, and in default of daughters, on the daughter's offspring, females having precedence over male offspring. It is only in default of the daughter's line that sons succeed to their mother's stridhanam. The rule of devolution is substantially the same under the Dayabhaga system of Hindu Law which, unlike the Mitakshara, does not recognize the benefit of survivorship even in the case of unobstructed succession to the property of a male. In the case of the devolution of a male's property under the Mitakshara, the cardinal principle is that it should remain in the same family, and that is the reason why agnates, however remote, are preferred to cognates, however near, with one exception, viz., the daughter's son. So far as a widow, daughter, mother and paternal grandmother, who are specially provided for in the line of inheri-

tance, are concerned, they, as has now been conclusively established, are simply interposed during their life-time, without diverting the line of inheritance among agnates, until they are exhausted. There is not a single instance indicated in the Mitakshara of the benefit of survivorship between co-heirs inheriting stridhanam property, and, in our opinion, there is no divergence between the Mitakshara and the Dayabhaga as to the character of the estate which, in the case of stridhanam property, devolves upon co-heirs. It would be revolutionary to hold that all property which comes to two or more persons who happen to be members of an undivided family is taken by them with benefit of survivorship, and there is no warrant whatever in the Mitakshara for such a general proposition. It has been held in more cases than one that property which comes to members of an undivided family by devise or gift is not taken by them with benefit of survivorship. *Rewun Persad v. Mussumat Radha Beeby*¹, *Bai Diwali v. Patel Bechardas*². The Privy Council, no doubt, has ruled in the *Jagampet case*³ that the position taken by the High Court of Calcutta in *Jasoda Koer v. Sheo Pershad Singh*⁴, and by this Court in *Sri Raja Chelikani Venkataramanayamma Garu v. Appa Rau Bahadur Garu*⁵, that obstructed heritage universally devolves on co-heirs as tenants in common, and not as joint tenants with benefit of survivorship, is one that is erroneous; but their Lordships have abstained from laying down that, as a universal rule, a heritage which devolves upon co-heirs, who happen to be all or some of the members of an undivided family under the Mitakshara, is taken by them with benefit of survivorship. They refer only to two instances as disproving the universal proposition laid down by the Calcutta High Court, viz., the case of widows and daughters on whom the inheritance devolves with benefit of survivorship, both under the Mitakshara and Dayabhaga, and that even after they effect a partition between themselves of their limited estate in which they have no interest surviving them, either joint or several, transmissible to their heirs. *Muttu Vaduganadha Tevar v. Dora Singha Tevar*⁶. But we may

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1. 4 M. I. A. 137 at p. 174.

2. I. L. R., 26 B. 445.

3. I. L. R., 25 M. 678.

4. I. L. R., 17 C. 33.

5. I. L. R., 20 M. 207.

6. I. L. R., 3 M. 290 at p. 301.

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observe that both these cases are cases of inheritance to the property of a male, and do not affect the question of the devolution of Stridhanam property.

It is certain that the author of the Mitakshara does not distinguish the heritage of Stridhanam as unobstructed and obstructed, a distinction which, according to his scheme, was pertinent only to the inheritance of male property. The definitions of "obstructed" and "unobstructed" given by him, and by those who follow him, refer in terms only to the heritage of property of a male.

The learned pleader for the respondent urges that the character of the property which devolves upon sons, whether from their father or from their mother should be taken to be the same, inasmuch as the Mitakshara deals with both in one and the same text in more than one place. He first refers to chap. I, section 3, commenting upon Yajnavalkya's text chap. II, verse 117, which runs as follows:—"Let sons divide equally both the effects and the debts after the demise of their two parents. The daughters share the residue of the mother's property after payment of their share of her debts, and the issue succeed in their default." The author of the Mitakshara explains this text, so far as it relates to the mother's heritage, as meaning only that, inasmuch as it is the obligation of the sons, and not of the daughters, to discharge the mother's debts, the sons are entitled, even if there are daughters, to inherit so much of the assets of the mother as is necessary to discharge her debts, and that the daughters succeed to the residue; but if there be no debts of the mother to discharge, the daughters inherit the whole estate in preference to the sons. The author of the Mitakshara, therefore, in this passage had not in contemplation the character of the estate devolving upon sons from the mother. He was only pointing out that the real meaning of Yajnavalkya was not that, on the death of the mother, the sons ought to divide her property among themselves as might at first sight be supposed, but only that they are to inherit such portion of the mother's property as may be necessary to discharge her debts, and that it is upon the daughters that the inheritance devolves, subject merely to a deduction in favour of the sons if there are any debts of the mother to be discharged.

The learned pleader for the respondent next refers to chapter I, section 4, commenting upon Yajnavalkya's text, chap. II, verse 118 in which it is declared that whatever is acquired by one co-parcener alone, without detriment to the father's estate, does not appertain to the co-heirs. The author of the Mitakshara explains that the father's estate referred to in the text will also apply to mother's estate, in other words, whatever is acquired by one of the sons, without the aid of the mother's Stridhanam, will belong to himself, and not to him along with the co-heirs. Though the author of the Mitakshara here refers only to the mother, the reference is only by way of illustration, and the import simply is that whatever is acquired by one of the co-heirs without the aid of the heritage which has devolved on the co-heirs, no matter from whom, will belong to him solely, and it is only if the acquisition is made with the aid of the heritage that it will really form an accretion to the heritage and belong to all the co-heirs (Burnell's Dayavibhaga p. 48; Smriti Chandrika chapter 6, paragraph 2, Krishnasamy Iyer's Translation p. 78; Dayabhaga, Chapter 6, section I, paragraph 17; Stokes's Hindu Law Books, page 269). The author of the Mitakshara, therefore, was not thinking of the character of the heritage devolving on a plurality of co-heirs from different relations, but his object was only to declare that if one of the co-heirs makes an acquisition without the aid of such an heritage, it belongs to him solely, and the co-heirs of the heritage cannot claim a share in such acquisition. Though the author of the Mitakshara deals specially with the partition of father's heritage by sons, yet it is clear from Chap. I, S. 1, paragraphs 4 and 5, that the rules prescribed for the partition of the father's estate apply *mutatis mutandis* to the partition of heritage from any relation, and by co-heirs, whether sons or other relations of the deceased.

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Another argument used by the respondent's pleader is that, as in the case of the grandsons inheriting to the paternal grandfather, so in the case of grand-children inheriting to the Stridhanam of the maternal or paternal grandmother, they take *per stirpes* and not *per capita*. No doubt there may be this similarity, but, as pointed out by the learned pleader for the appellant, there is a dissimilarity in another respect, *viz.*, that where the deceased dies leaving children and grandchildren the grandchildren do not

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by representing their deceased mother or father, as the case may be, step into their shoes and inherit along with the children of the deceased.

The respondent's argument does not, therefore, carry any weight, and is especially ineffective in view of the fact that, notwithstanding that daughter's sons do not take *per stirpes*, but *per capita*, it has been held by the Privy Council that maternal grandfather's property devolves upon them with benefit of survivorship. We must, therefore, hold that none of the arguments addressed to us show that stridhanam property, when it devolves upon a plurality of heirs, is held by them with benefit of survivorship, or that, at any rate, it is so in the case of stridhanam property of a mother devolving upon her sons. We must also hold that in the case of the devolution of stridhanam property there is nothing peculiar in the Mitakshara law as distinguished from the Dayabhaga law, so as to import the doctrine of survivorship as between the co-heirs and thus restrict the operation of the rules of inheritance laid down for the devolution of stridhanam property.

Our answer to the question referred to us in Appeal Suits Nos. 152 and 186 is that the sons take the stridhanam of their mother as co-owners or tenants in common.

The second question referred for our opinion is whether the maternal uncle's estate devolves upon his nephews who, at the time of their uncle's death, are members of an undivided family, as joint tenants with benefit of survivorship, or as tenants in common, or co-owners without benefit of survivorship.

The real question which we have to decide is whether this matter is concluded by the ruling of the Privy Council in the *Jagampet case*¹.

We should have no hesitation in holding that it is not so concluded, but for the observations contained in the Judgment of the Privy Council that the decision of this Court in *Sri Raja Chelikani Venkataramanayamma Garu v. Appa Rau Bahadur Garu*² which was before their Lordships in Appeal and which was reversed, and also the decision of this Court in *Saminadha Pillai*

1. I. L. R., 25 M. 678.

2. I. L. R., 20 M. 207.

v. *Thangathanni*¹ were open to the same objections as their Lordships pointed out to the decision of the Calcutta High Court in *Jasoda Koer v. Sheo Pershal Singh*², which was followed by this Court in the two cases referred to. After full consideration, and not without some diffidence, we have come to the conclusion that the ruling in the *Jagampet case* does not conclude the question referred to us. At the outset we may observe that the ruling of their Lordships with which we are dealing in terms applies only to the case of daughter's sons. These form a class of co-heirs, not liable to be increased after the inheritance has devolved on the class. But the same cannot be said of all other classes of co-heirs, such as sisters' sons who succeed in priority to a sister, *Lakshmanammal v. Thiruvengada*³. In the case of the latter class, therefore, an anomaly occurs in applying the principle of survivorship which does not arise in applying it to the former class. In the case of daughter's sons the inheritance will not devolve on them until after the death of all the daughters, and no one, therefore, can come into existence in the undivided family, as a daughter's son, after the inheritance has devolved upon the class; but in the case of the heritage of a maternal uncle there may be only one or two nephews in the undivided family at the time of the uncle's death, and the other nephews may be born subsequent thereto. Though such after-born nephews are part of the same class as the nephews who were in existence at the time of the uncle's death, yet they can acquire no right in the property of their maternal uncle which has already vested in the nephews who were in existence when the uncle died.

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Such right as they may acquire by birth in the joint family property of their father or grandfather will be limited to paternal property or to property of the paternal line. In an undivided family every member on birth acquires a right in such property, and the right accruing to him is equal to that of his father in the paternal grandfather's property. By the principle of representation, which obtains in an undivided family, the male issue of a deceased member steps into the shoes of the deceased.

In the case, then, that we are considering, the after-born nephew cannot, on his birth into the undivided family, acquire

1. I. L. R., 19 M. 70.

2. I. L. R., 17 C. 33.

3. I. L. R., 5 M. 241.

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any right in the property of his maternal uncle since it had already vested in his brothers before he was born.

If sisters' sons take the heritage simply as co-heirs, without benefit of survivorship though they are members of an undivided family, the property will belong to them as their separate property, and on the death of each, his undivided share will devolve upon his separate heirs, including of course his after-born brothers.

In the *Jagampet case* their Lordships of the Privy Council, while stating that in the grandfather's hands the estate was separately acquired property, added that it became ancestral property in the hands of the grandsons when it devolved on them by inheritance; and their Lordships applied the law of survivorship in tracing succession to such property on the death of one of the grandsons. We cannot, therefore, regard the use of the expression "ancestral property" as suggested by the learned pleader for the appellant as a mere casual statement, carrying no special significance. In the Hindu law the word "ancestor" is not used in the wide sense in which it is used in English law as merely equivalent to the *propositus* and as the correlative of heir. In Hindu law it is used only as signifying a direct ascendant in the paternal or maternal line, and more technically as signifying the paternal grandfather and his ascendants in the male line, and in Colebrooke's translation of the Mitakshara it is the expression "father's father's property" that is translated into "ancestral property." While it may or may not be that the expression "ancestral property" in their Lordships' judgment is used in the latter sense in which technical sense it is used in several judgments of their Lordships of the Privy Council and also by the Indian Legislature in *Suraj Bansi Koer v. Sheo Persad Singh*¹, *Parbati Kumari Devi v. Jagadis Chunder Dhabal*², *Rajah Suraneni Venkata Gopala Narasimha Row v. Rajah Suraneni Lakshma Venkama Row*³, *Umrithnath Chowdhry v. Goreenath Chowdhry*⁴, and Article 126 of the second Schedule to the Indian Limitation Act of 1877, it appears to us clear that it is not used as denoting property other than that which has devolved from a direct ancestor either in the paternal or maternal line. In the case before their Lordships the property had devolved from the maternal grandfather. In the

1. I. L. R., 5 C. 148 at 164.

2. 29 C. 433 at pp. 452.

3. 13 M. I. A. p. 113 at p. 140.

4. 13 M. I. A. p. 542 at p. 544.

present case the maternal uncle from whom the inheritance devolved cannot be regarded as an ancestor in the maternal line, in the sense in which the term is used by writers on Hindu Law. So far as daughter's sons are concerned, they have a peculiar position in the Hindu Law which is denied to all other cognates. Under the older Hindu Law, the son of an appointed daughter (*putrika putra*) was equal to an *Jurasa* or legitimate son and he took his rank, according to many authorities, as the highest among the secondary sons. Although this branch of the law is now obsolete, its effect survives in the Hindu Law of Inheritance and in the consciousness of the people, for even now he takes a place practically next after male issue, the widow and daughters being simply interposed during their respective lives and the maternal grandfather is regarded "as becoming the possessor of a son's son."

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The position of a daughter and daughter's son in the line of inheritance is considered in the *Mitakshara*, Ch. 2, S. 2, paragraphs 5 and 6, from which we quote the following: "Then *Vishnu* says 'If a man have neither son, nor son's son, nor (wife nor female) issue, the daughter's son shall take his wealth. For in regard to the obsequies of ancestors, daughter's sons are considered as son's sons.' *Manu* likewise declares "By that male child whom a daughter, whether formally appointed or not, shall produce from a husband of an equal class, the maternal grandfather becomes the grandsire of a son's son: let that son give the funeral oblation and possess the inheritance." See also *Dayabhaga*, Chap. XL, Sect. II, paragraphs 18, 19 and 20 (*Stokes's Hindu Law Books*, p. 327).

The difference in his position under the old law and the present law is that under the former if he is the son of an appointed daughter, (and only one such daughter can be appointed), he becomes by a fiction of law the son or son's son of the maternal grandfather, and as such a member of the grandfather's family and is not a member of his own father's family (*Mitakshara*, Ch. 1 S. 11, paragraph).

Under the present law he is a member of his own father's family, but he is regarded as being also as good as a son's son to his maternal grand-father.

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If by reason of a daughter's son being considered for spiritual purposes as equal to a son's son, when the maternal grandfather dies without male issue, the estate devolving upon him, (though as 'obstructed heritage') from the maternal grandfather, can, by a fiction of law, be regarded as 'ancestral' property in his hands in the technical sense in which that term is used in the Hindu law, viz., as denoting property descending from a paternal male ancestor, the daughter's sons, when there are more than one, will not only hold such estate as joint family property with mutual rights of survivorship to the exclusion of their father and his other coparceners, if any, but their male issue will also on birth acquire in such property, a right jointly with and equal to their father's. But if the estate devolving on daughter's sons is to be regarded only, as in truth it is, as coming to them from the maternal line, their male issue cannot acquire in such estate a right by birth equal to their father's, for such right is expressly limited to property devolving upon the father from the paternal line (*Mitakshara*, Ch. I, S. 5, paragraph 5). The anomaly in the latter view will be that though the daughter's sons who are undivided as between themselves hold the maternal grandfather's estate, (according to the ruling of the Privy Council in the *Jagampet* case), as joint family property with the benefit of survivorship as understood under the *Mitakshara* law, yet their male issue will not become joint owners in such property possessing equal rights with their father. There can hardly be any doubt that the right of survivorship on which the ruling of the Privy Council is based, is the right of survivorship obtaining under the *Mitakshara* system, (*Jogewar Narain Deo v. Ram Chandra Dutt*) according to which the right will not prevail in favour of the survivor, as against the male issue of the deceased. Under the *Mitakshara* joint family system there can be no joint family property in respect of which the male issue of the joint owners will not by birth become joint owners with their father (See *Sudarsanam Maistri v. Narasimhulu Maistri*¹).

If, therefore, we are to understand the expression 'ancestral property' in their Lordships' judgment otherwise than in its technical sense, according to which it is property in which a son on his birth becomes an equal owner with his father, the result of

1. I. L. B., 23 C. 670 at 679.

2. I. L. R., 25 M. 149 at pp. 155, 156.

the ruling will be that a species of joint family property unknown to the Mitakshara will be brought into existence.

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But for the absence of any allusion in the judgment of the Privy Council to the texts already quoted, declaring a daughter's son to be as good as a son's son, and that "there is no difference in law" between them, we should not hesitate to say that the expression 'ancestral property' is used in the judgment in the technical sense already referred to. The nature of the estate devolving upon a daughter's son was considered by this court in two cases *Muttayan Chetty v. Sivagiri Zamindar*¹, *Sivaganga Zamindar v. Lakshmana*² both of which were considered by this court in the *Jagampet case*³. In both the question raised was whether the son of the daughter's son had a right of interdiction against an alienation made by his father of his maternal grandfather's property. In both these cases it was held that though in respect of such property, the son may not on birth become an equal owner with his father, entitled to demand partition from his father, yet such property is not the self-acquisition of the father which he can alienate at his will and pleasure. The former case was carried in appeal to the Privy Council and their Lordships, while concurring in the view that the property was not the self-acquisition of the father, refrained from deciding whether or not the father had absolute power of disposition over such property as he has over his self-acquisition—the decision of that question having become unnecessary in the view which they took of the case on another point. If, in the recent decision of the Privy Council in the *Jagampet case*⁴, the expression 'ancestral property' be regarded as having been used by their Lordships in the restricted technical sense above referred to, the result will be that the son will have an equal right with his father in the property which has devolved on the latter from his maternal grandfather, and the *ratio decidendi* of the ruling itself may be inferred to be that when the maternal grandfather's property devolves upon the sons of a daughter, they and they alone succeed to the maternal grandfather as if he was their father's father, but in respect of their own paternal property they will be joint owners thereof with their father and his other co-parceners, if any.

1. I. L. R., 3 M. 370.

2. I. L. R., 9 M. 188.

3. I. L. R., 25 M. 678.

4. I. L. R., 6 M. 1.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Rungiah Goundan and others ... Appellants*
(Petitioners).

v.

G. Nanjappa Row and others ... Respondents.
(Counter-Petitioners.)

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Limitation Act XV of 1877, Arts. 178 and 179—Act IX of 1871, Art. 167 para. 4—Test of applicability of Article—Mortgage-decree—Application for execution—Limitation—Civil Procedure Code, S. 243—Stay of execution—Suit disposed of—Application after such disposal of—Application for order absolute—Application to keep decree alive.

Whether Art. 179 or Art. 178, will apply to a particular application will depend upon the nature and portion of the decree sought to be executed and upon the fact of the application in question being the first or a subsequent application.

The true criterion in determining whether Art. 179 or 178, applies to a particular application is to ascertain whether any one of the six points of time specified in Col. 8 of Art. 179 is applicable to it and if none of them applies it is only then that Art. 178 will apply.

Under the present Law (See para. 4 of Art. 179) an application cannot be made merely for the purpose of signifying the decree-holder's intention to keep the decree in force as it would be possible under the old Law (See para. 4 of Art. 167 of Act IX of 1871)

An order staying execution under S. 243, C. P. C., merely postpones execution but does not vary the decree.

An order varying the decree can only be made either on review under S. 623, C. P. C., or on amendment under S. 206, C. P. C., or under S. 210, C. P. C.

An order staying execution may be passed either by the Court which passed the decree or by the Court executing the decree as a proceeding in execution under S. 244, C. P. C.

Where an order is passed under S. 243, C. P. C., staying execution of a decree pending the disposal of a suit, no day is fixed for payment of the amount due under the decree within the meaning of para. 6, Art. 179 (3rd Col.).

* A. A. O. Nos. 111 and 112 of 1902.

16th July 1903.

A decree which directs a sale of the mortgaged property in default of payment of the mortgage money within a time fixed by the decree is not a decree directing the payment of the amount to be made at a certain date within the meaning of para. 6, Col. 3 of Art. 179, Schedule II of the Limitation Act (XV of 1877).

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Where no prior application for execution of such decree or to take some step in aid of execution is made and an order is obtained under S. 243, C. P. C., staying execution of such decree pending the disposal of another suit then an application for execution made after the disposal of such suit is governed by Art. 178 of Schedule II of the Limitation Act although 3 years may have elapsed from the date of the decree or the date mentioned in the decree for payment provided the application is within 3 years from the disposal of the suit when the right to apply for execution accrues and provided 3 years from the date mentioned in the decree for payment have not elapsed at the date of the order staying execution.

A first application for execution of a decree directing the sale of mortgaged property made on default of payment by the mortgagor within the time fixed is governed by Art. 178 and not Art. 179.

Where there is a personal decree against the mortgagor and the application is to execute the decree as such, limitation will run from the date of the decree under para. 1, if payment is enforceable under the decree from the date thereof or from a future date if payment can be enforced under the decree only on or after such future date fixed in the decree.

An application for an order absolute for sale under S. 89 of the Transfer of Property Act is only an application to enforce the decree.

In construing the Articles of Schedule I of the Limitation Act stress must not be laid exclusively upon the entry in the first column ignoring the entries in the 3rd column.

If the various starting points fixed in the 3rd column of any article from which the period of limitation is to be reckoned do not cover all cases falling within the class of suits or applications described, then the article in question is not exhaustive of the class. If the article is inapplicable to certain cases comprised in the class, those cases will be governed, in the case of suits by the residuary Article No. 120 and in the case of applications by the residuary Article No. 178.

Appeals from the orders of the Subordinate Judge's Court of the Nilgiris, E. P. No. 418 of 1902 and in M. P. No. 245 of 1902, respectively, in O. S. No. 74 of 1896.

The Advocate-General, C. Sankaran Nair and S. Kasturiranga Aiyangar for appellants.

A. S. Cowdell and P. S. Sivaswami Aiyar for respondents.

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The Court delivered the following

JUDGMENT:—In A. A. O. No. 111 of 1902.—This is a matter arising in execution of the decree in O. S. No. 74 of 1896 which was brought by the appellants against the respondents. The decree bears date the 10th November 1897 and the portion of the decree that is now sought to be executed runs as follows:—“That in default of the defendants or any of them paying the sum of Rs. 47,852 with further interest thereon at 7 per cent. per annum from date of suit to date of payment on or before the 10th May 1898, the hypothecated property hereinafter described or a sufficient portion thereof be sold and that the proceeds of such sale, etc.” At the time of the passing of the said decree there was pending in the same court another suit No. 82 of 1896 which was brought by the respondents Nos. 1 to 3 against the appellants and in which they claimed Rs. 93,973-2-10 from the appellants. On the 27th November 1897 an application was made by respondents Nos. 1 to 3 (defendants) in O. S. No. 74 under S. 243, Civil Procedure Code for stay of execution of the decree therein pending the disposal of O. S. No. 82 and after issuing notice to the appellants an order was passed on 31st January 1898 directing stay of execution of the decree in O. S. No. 74 until the disposal of the said suit No. 82 of 1896. O. S. No. 82 of 1896 was tried and disposed of by the Sub-court on 23rd December 1901. Thereupon, the present application (E. P. 418 of 1902) was made by the appellants on the 20th March 1902 praying for the sale of the hypothecated properties and the Subordinate Judge applying article 179 of schedule II, Indian Limitation Act, held that the application was barred by limitation and dismissed the same.

This was the very first application made for execution and it is admitted that no prior step in aid of execution had ever been taken. If, as held by the Subordinate Judge, the article of the law of limitation applicable to the case were 179, we should be constrained to uphold his decision and hold that the application was barred by limitation and that S. 15 of the Limitation Act could not be relied on for saving the application from the bar of limitation as the provision therein made for enlarging the ordinary period of limitation is applicable only to a suit, which word as defined in S. 3 of the Act must, for the purpose of limitation, be taken as excluding

applications which are made in a suit. It may be that under Act IX of 1871 there was no necessity to extend the provisions of S. 16 of the Act (which corresponds to S. 15 of the present Act) to applications for execution of decrees, for under that Act though the execution of a decree might have been stayed by injunction or otherwise, the decree-holder might, for the purpose of the law of limitation, simply present a petition signifying his intention to keep the decree in force and such application though it was presented during the continuance of the order staying execution would give him a fresh starting point (vide paragraph 4, column 3, article 167, Schedule II Act IX of 1871. Under paragraph 4 of column 3 of article 179 of Act XV of 1877, corresponding to article 167 of Act IX of 1871, the application which would furnish a fresh starting point for limitation must be one made in accordance with law for execution or to take some step in aid of execution of the decree and not one made merely to keep the decree in force. Such being the case it is only reasonable and proper that in computing the period of limitation prescribed for an application for execution of a decree the time during which the attaching decree-holder prosecutes a suit under S. 283, Civil Procedure Code or during which execution of the decree or a portion of it has been stayed by injunction or otherwise should be excluded. But as the law now stands "such course is not authorised" (*Narayanan Nambi v. Pappi Brahmam*¹) and it is not always possible to relieve the applicant from the bar of limitation by reviving an application which had been presented before the institution of the suit under S. 283 or before the order staying execution. It may be that as in the present case no application had been or could have been presented before the order staying execution. And in cases in which an application had been presented prior to the suit under S. 283 or to the order staying execution, it might have terminated in a manner which would make it impossible to revive the same, after the disposal of the suit or the expiration of the order as the case may be.

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It has been argued on behalf of the appellants that even under article 179, the application is not barred by limitation inasmuch as the effect of the order passed under S. 243, Civil Procedure Code, staying execution of the decree was to postpone the date fixed for

1. I. L. R., 10 M. 22 at p. 24.

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payment from the 10th May 1898 to the date of the decree in O. S. No. 82 *viz.*, 23rd December 1901 and reading the decree as thus varied limitation should be reckoned from the latter date under paragraph 6 of column 3 of article 179. It is impossible to accede to this argument for two reasons. An order relating to the stay of execution cannot be regarded as an order varying the decree either on review (S. 623) or under S. 206 or under S. 210 which are the only sections under which a decree can be altered or varied by the court which passed the same. An order staying execution is passed not necessarily by the court which passed the decree, but by the court executing the decree as a proceeding in execution under S. 244, and the order is in reality only one postponing execution and not one varying the decree.

Further, a decree which directs the sale of mortgaged property in default of payment of the mortgage money declared due on or before the date fixed in the decree, is not, within the meaning of paragraph 6, column 3, article 179, a decree directing the payment of the amount to be made at a certain date. If, however, there is also a personal decree against the mortgagor and the application is to execute the decree as such, limitation will run from the date of decree under paragraph 1, if payment is enforceable under the decree from the date thereof or from a future date under paragraph 6, if payment can be enforced under the decree only on or after such future date fixed in the decree. Neither paragraph 1 nor paragraph 6 can apply to the execution of a mortgage decree as such, *i. e.*, to an application for sale of the mortgaged property which the decree directs to be sold, in default of payment of the ascertained amount on or before the day fixed in the decree.

In our opinion the application in question is governed by article 178 and not by article 179, inasmuch as no prior application for execution of the decree or to take some step in aid of execution of the decree had been made, and we cannot accede to the contention on behalf of the respondents that article 179 is exhaustive of applications for execution of decrees and that article 178 cannot be applied to any application for execution of any decree. In construing article 179 one must not lay undue stress upon the entry in the first column, ignoring the entries in the third column. If the various starting points fixed in the third column of any article

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from which the period of limitation is to be reckoned do not cover all cases falling within the class of suits or applications described in the first column, it will be impossible to hold that the article in question is exhaustive of the class. If the article is inapplicable to certain cases comprised in the class those cases will be governed, in the case of suits, by the residuary article No. 120 and in the case of applications by the residuary article No. 178. By way of illustration we may refer to two instances in support of this view. Though the first column of article 10 is exhaustive of the class of suits to enforce a right of pre-emption yet it was found that neither of the points of the time fixed in the third column thereof was applicable to the case of *Batul Begum v. Mansurali Khan*¹ and the Privy Council held in that case that the article applicable was not article 10 though the suit was one to enforce a right of pre-emption but the residuary article No. 120. Similarly the first column of article 64 is in terms exhaustive of suits for the recovery of money due on accounts stated. But the third column clearly shows that the article is limited to cases in which the accounts are stated in writing signed by the defendant or his agent. It has been held in several reported cases that article 179 is inapplicable to certain applications for execution of decrees and that the appropriate article applicable thereto is 178. In *Muhammad Suleman Khan v. Muhammad Yar Khan*² in which the decree as originally drawn was incapable of execution it was held that an application made within three years from the time when it was under S. 206 amended (about 12 years after the date of the decree) was governed not by article 179 but by article 178. When a decree is amended under S. 206, it will of course continue to bear the original date and it was held in that case that the first paragraph of column 3, article 179 can apply only to cases in which the decree is enforceable on its date and as the decree became enforceable only after its amendment under S. 206, the right to apply for execution accrued only on that date and that the application was therefore within time under article 178. In *Muhammad Islam v. Muhammad Ahsan*³ the decree was for recovery of possession of immoveable property but only on default being made by the

1. L. R., 28 I. A., 248 S. C. I. L. R., 24, A. 17.

2. I. L. R., 17 A. 39.

3. I. L. R., 16 A. p. 237.

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judgment-debtor in the payment year by year of a certain annuity to the decree-holder and it was held that the limitation applicable to an application for the recovery of the property, on default, in execution of such decree was that provided for by article 178. Paragraph 1 of article 179 could not apply, because the property was not recoverable at the date of the decree; nor paragraph 6 because it does not apply to delivery of property moveable or immoveable. We may here refer to S. 429 of the Civil Procedure Code which prescribes that when a decree is passed against Government, say for the delivery of land, a time must be fixed in the decree for the delivery and no execution shall issue until after the expiration of three months from the date of the report made by the Court to Government bringing to notice that the decree has not been complied with. If paragraph 1 of article 179 does not apply to the case because the decree is not enforceable on its date, there is no other paragraph which can apply and the application or rather the first application will be governed by article 178 and the three years will be reckoned from the expiration of the three months already referred to. In *Chedi v. Lala*¹ it was held that paragraph 1 of article 179 is applicable only to cases where there is a decree or order which can at its date be executed, but that as the decree in a pre-emption suit is not capable of enforcement until the decree-holder pays into court the pre-emption price the first application for execution of such decree is governed not by article 179 but by article 178, and that limitation commences to run against the decree-holder from the time when the pre-emption price is paid. It may well be doubted whether the decree in a pre-emption suit is not one enforceable at its date, inasmuch as it is perfectly open to the decree-holder to pay the amount into court on the date of the decree and apply for execution. In *Maruthi v. Krishna*², the decree provided for redemption by the plaintiff on payment within a month, and it was held that as it was enforceable from its date, it being open to the plaintiff to pay the decree amount on its date, the application was governed by article 179 and not by article 178.

In the case of a decree for perpetual injunction there may be nothing enforceable at the date of the decree and the disobedience

1. I. L. B., 24 A. p. 300.

2. I. L. B., 23 B. 592.

itself may take place more than three years after the date of the decree. None of the paragraphs in the third column of article 179 can apply to the first application for the enforcement of such a decree under the provisions of section 260, Civil Procedure Code, and the application will be governed by article 178, *Rajaratnam v. Shevalayammal*¹. In *Thakur Dos v. Shadidil*², the decree provided that if the judgment debt was not paid within four months the decree-holder should have the power to recover it by sale of the mortgaged property, and it was held that inasmuch as the decree provided expressly that the decree-holder might not apply for its execution till after the expiry of four months from its date, the first application made after the expiry of four months and within three years thereafter, though more than three years from date of decree was governed by article 178 and not by article 179. This decision is directly applicable to the present case and we entirely concur in it. The question was again brought under the consideration of the Allahabad High Court in the recent case of *Ali Alimod v. Naziran Bi*³ where after reviewing all the previous decisions, it was held that an application by the plaintiff mortgagee for an order absolute under S. 87 of the Transfer of Property Act foreclosing the defendant's right of redemption is an application for execution of the decree passed under S. 86 of the Act and is governed by article 178 and not by article 179 of the 2nd schedule to the Indian Limitation Act, the time being reckoned from the date fixed by the decree for payment of the mortgage money by the defendant-mortgagor. As to the application of paragraph 1 of the third column to such a case the learned judges (*Bannerjee and Aikman, JJ.*) observed as follows:—
 “Now there can be no doubt that the decree or order referred to in paragraph 1 must be a decree or order which on the date of it is capable of execution, and that the *terminus a quo* cannot be a date on which the decree or order is not executable.” Referring to the two previous cases of *Chunni Lal v. Harnam Das*⁴ in which the decree was for the sale of the mortgaged property and *Parmesri Lal v. Mohan Lal*¹, in which the decree was for foreclosure of the mortgage, both of which were relied on in support

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1. I. L. R., 11 M. 103.

3. I. L. R., 24 A. 542.

2. I. L. R., 8 A. 56.

4. I. L. R., 20 A. 302.

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of the contention that article 179 was applicable, the learned judges (one of whom took part in the former of the said two cases) who also consulted Mr. Justice *Burkitt* who decided the latter case, observed that the only question considered and decided in those cases was whether applications for an order absolute for sale or for foreclosure are or are not applications for execution and as such governed by the period of limitation prescribed for the execution of decrees and not whether the period of limitation applicable thereto was that provided by article 179 or by article 178, and that in both these cases the application was held to be barred by limitation, reference being made in the judgment to article 179, and that the result would be the same whether article 179 or article 178 applied.

Reference may here be made also to the recent case of *Ashraf-uddin Ahmad v. Bepin Behari Mullick*¹, which appeared in the *Law Reports* after judgment in this appeal was reserved. In one of the appeals dealt with in that case, *viz.*, Appeal No. 203 of 1901, the decree sought to be executed was an ordinary decree for money to which a clause was added that "the plaintiff shall not be able to take out execution of the decree until the disposal of the petition for insolvency made by the defendants before the District Judge of Patna." It was held that this clause, amounting only to an order staying execution of the decree till the disposal of the insolvency petition and not to a direction within the meaning of paragraph 6 of article 179, that payment of the amount decreed be made "at a certain date," *viz.*, date of disposal of the insolvency petition, none of the points of time specified in the third column of article 179 was applicable to the case, and that the application for execution was therefore governed by article 178, but that nevertheless the application was barred as the right to apply within the meaning of column 3 of article 178, accrued on the date when the insolvency petition was granted by the original Court under S. 351, Civil Procedure Code, and not on the date when the Receiver was discharged or the insolvency petition was finally disposed of in appeal. The present case is even stronger as to the applicability of article 178, inasmuch as the order staying execution

1. I. L. R., 20 A. 375.

2. I. L. R., 30 C. 407.

of the decree was passed under a specific provision enacted by S. 243 of the Civil Procedure Code.

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The learned pleader for the respondents placed strong reliance also upon the passage at pp. 268 and 269 in the recent Full Bench decision of this Court in *Mallikarjunadu Setti v. Lingamurti*¹, to the effect that an application for an order absolute under S. 89 of the Transfer of Property Act is an application for execution of the decree passed under S. 88, that is governed by Article 179 of the Limitation Act, and that an order thereon is appealable as an order under S. 244, Civil Procedure Code. Among the points referred to the Full Bench in that case there was no question as to the period of limitation for an application made under S. 89, Transfer of Property Act, for an order absolute for sale. The High Court of Calcutta has held that such an application is not an application for execution of a decree and that there is no period of limitation applicable thereto. All that was decided in the Full Bench case was that it was an application for execution of the decree, and as such it would be governed by the period of limitation prescribed for execution of decree and reference was causally made to article 179 as that is the one ordinarily applicable to execution of the decrees. There was no question raised or argued as to whether article 179 or article 178 was applicable, for the simple reason that no question of limitation was at all involved in the case. To be fastidious, it should have been observed that an application for an order absolute for sale is an application for execution of the decree and that for purpose of limitation it would be governed by article 179 or article 178 as the case might be.

Following the decisions quoted above, we hold that the present application is governed by article 178 and not by article 179. We are not to be understood as laying down that all applications for the execution of a decree for sale of mortgaged property are governed by article 178. Though at the date of the original decree it may not be enforceable, yet if at the date of the appellate decree it is enforceable, even the first application for sale made after the appellate decree will be governed by article 179, paragraph 2,

1. I. L. B., 25 M. 244.

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and not by article 178, the time being reckoned from the date of the appellate decree. If the application in question has been preceded by another application made in accordance with law for execution or to take some step in aid of execution, the article applicable will as a general rule be 179, paragraph 4 and not article 178; similarly if a notice has been issued under S. 248, Civil Procedure Code prior to the application in question article 179, paragraph 5 will apply. Whether article 179 or article 178 is applicable to a particular application will depend upon the nature and portion of the decree sought to be executed and whether the application that is made is the first application or a subsequent application. The true criterion in determining whether article 179 or 178 applies to a particular application is to ascertain whether any one of the six points of time specified in column 3 of article 179 is applicable to it and if none of them is applicable, it is only then that article 178 will apply. There is therefore no force whatever in the argument advanced by the learned pleader for the respondents, that if article 178 is made applicable to the execution of a mortgage decree for sale the decree-holder can make no application at all after three years from the date fixed for sale even if he had made an application within three years from such date. In the view we take of articles 178 and 179, the decree-holder will have the full benefit of article 179 whenever any of the 6 paragraphs of column 3 thereof can furnish a starting point for his application. It is only when the decree is not enforceable at the date on which it is made, and when the decree-holder will be prejudiced by the application of paragraph 1 of the third column of article 179, that his application may be saved from the bar of limitation by article 178 as in the present case.

In this very case if the present application is held not barred, any subsequent application which the decree-holder may make for execution, will be governed by article 179, paragraph 4.

Applying, therefore, article 178 to the case, the only question, that remains for consideration is when did the decree-holder's right to apply for sale accrue within the meaning of column 3 of article 178. But for the circumstances that the respondents Nos. 1 to 3 applied for and obtained an order for stay of execution of the decree before the 10th May 1898 up to which the

appellants could not have applied for an order absolute for sale, the decree-holder's right to apply for sale would have accrued on the 10th May 1898 and his present application would be clearly barred and it would be equally so even if the respondents had obtained an order for stay any day subsequent to the 10th May 1898. For if limitation had once begun to run under column 3 of article 178, the subsequent stay of execution would not affect it and for the reasons already stated in reference to article 179 the period during which the execution was stayed under S. 243 could not under the present state of the law be excluded in computing the period of limitation under article 178. Execution having been stayed prior to the 10th May 1898, the decree-holder's right to apply for sale accrued for the first time only on the disposal of O. S. No. 82 on the 23rd December 1901. It is impossible to accede to the argument that during the time that execution of the decree was stayed the decree-holder had a right to apply and that his right therefore accrued on the 10th May 1898, notwithstanding that if he had so applied, the court must have summarily rejected the same. In comparing paragraph 4 of article 176 with paragraph 4 of the corresponding article 167 of Act IX of 1871, we have already pointed out that no application could, under the present law, be made merely for the purpose of signifying the decree-holder's intention to keep the decree in force. That being so, the only application in accordance with law which it was open to the decree-holder to make in the present case was one subsequent to the 23rd December 1901, the date of the decree in O. S. No. 82.

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In support of this view we may refer to the decision of the Bombay High Court in *Kalyanibhai Dipchand v. Ghaneeshamlal Jadimathji*, in which it was held that an application made by the decree-holder, or rather his representative, after an order staying execution of the decree had expired, to revive an application which had been made by the decree-holder before such order, was governed by article 178 and his right to make such an application by seeking to have his name entered in the original application in the place of the decree-holder could not have accrued on the date of the death of the decree-holder, as the order staying execution

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was then in force, and that the right accrued only after the expiration of that order.

The appeal is accordingly allowed with costs and the order appealed against is reversed and the case remanded in order that the necessary order may be passed in due course of law to bring the mortgaged property to sale.

A. A. O. No. 112 of 1902 :—Subsequent to Execution Petition No. 418 of 1902 which was presented on the 20th March 1902, the appellant presented another petition on the 8th July 1902 purporting to be made under S. 89 of the Transfer of Property Act and praying for an order absolute for sale. The object of taking this step evidently was to contend (relying upon certain decisions of the Calcutta High Court) that such an application is not governed by the law of limitation, and that after obtaining such an order absolute, which according to certain decisions of the Calcutta High Court is the final decree in the case, they might apply for execution of such final decree. In the recent Full Bench decision of this court the majority held that the decree passed under S. 88, Transfer of Property Act is not a decree *nisi* or a preliminary decree, but the decree in the suit, and that an application for an order absolute for sale under S. 89 is only an application for enforcing the decree under Ss. 230 and 235 of the Code of Civil Procedure and that, as such, it is subject to the law of limitation prescribed for execution of decrees.

For the reasons stated in the judgment in A. A. O. No. 111 of 1902, it must be held that this application is also governed by article 178 and is not barred by limitation.

The appeal is accordingly allowed and reversing the order appealed against the case is remanded for the necessary final order to be passed in due course of law for sale of the mortgaged property. Each party will bear his own costs of this appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Boddam.

Sankararamier and another ... Appellants* (*Petitioners*).

v.

Subramania Aiyar and others ... Respondents (*Respondents*).*Civil Procedure Code, S. 409—Inquiry in petition for leave to sue in forma pauperis, scope of.*

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The evidence referred to in S. 409, C. P. C., is confined to evidence in proof or disproof of the pauperism of the applicant and does not include evidence as to the merits of the case.

*Ratnam v. Papa*¹, followed.

Where a District Judge ordered further particulars of the fraud alleged in the petition and after the further particulars were given, the District Judge heard the parties under S. 409, C. P. C. and dismissed the petition even after the furnishing of particulars on the ground that the case was not more explicit.

Held :—That the procedure adopted by the District Judge was irregular and materially affected the merits of the case, and his order may be set aside under S. 622, C. P. C.

Appeal under S. 15 of the Letters Patent against the judgment of the Hon'ble the Chief Justice, in C. R. P. No. 203 of 1902, presented under section 622 of the Civil Procedure Code to revise the order of the District Court of Coimbatore, dated 27th January 1902 on C. M. P. No. 91 of 1901.

V. Krishnaswami Aiyar for appellants.*P. S. Sivaswami Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—The decision appealed from appears to be in direct conflict with the decision of the Full Bench case in *Ratnam v. Papa*¹ where it was held that the evidence referred to in S. 409 of the Civil Procedure Code is confined to evidence in proof or disproof of the pauperism of the applicant and “not evidence as to the merits of the case.” That decision is contrary to the decisions in *Kamrakh Nath v. Sunder Nath*² and *Vijindra Thirtha Swami v. Sudhindra Thirtha Swami*³, and adopts the ruling in *K. Ranganayaki Ammal v. K. Venkatachellapati Nayudu*⁴. In this case the Judge ordered further particulars to be given of the fraud alleged in the plaint after having heard the parties under S. 409

* L. P. A. No. 17 of 1903.

27th July 1903.

1. 13 M. L. J. R., 292.

3. I. L. R., 19 M. 197.

2. I. L. R., 20 A. 299.

4. I. L. R., 4 M. 323.

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and finally dismissed the petition because he held that after the petition had been amended by the entry of the particulars ordered it was not more explicit than the original petition had been.

We think that where the petition contains sufficient particulars to show a cause of action as in this case, no further particulars can be required under S. 409 though after leave to sue as a pauper has been given under that section the sections relative to further particulars in the Code are applicable to a pauper suit as much as to any other. The case of the 2nd petitioner stands on even a stronger position. As a member of the family at the time of the partition and not actually a party to it he would be entitled to his share in all the family property unless his father's deed appears to be binding on him.

The procedure adopted by the District Judge was irregular, and materially affected the merits of the case. We set aside the order of the learned Judge as well as of the District Judge, and we direct that the application be granted and dealt with under S. 410.

The costs throughout shall be costs in the cause.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Moore.

Municipal Council, Kurnool ... Petitioner* (*Defendant*).

v.

Subbanna Chetty ... Respondent (*Plaintiff*).

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Council,
Kurnool
v.
Subbanna
Chetty.

District Municipalities Act, Ss. 261 and 262—Notice to Municipality—Amount of damages not specified—Municipality stating notice defective—Sender of notice requesting to be informed of defect—Objection under S. 262 not raised in first Court—Revision—Act IX of 1887, S. 25.

When a notice sent to a Municipality in compliance with S. 261 of the District Municipalities Act did not specify the amount claimed as compensation or damages and upon the Municipality stating to the sender of the notice that the same was defective the sender asked the Municipality to inform him of the nature of the defect, but the Municipality took no notice of his request, the suit should not be dismissed for the plaintiff not having complied with S. 261.

*Eales v. Municipal Commissioners of Madras*¹.

An objection by the Municipality that a suit against them is barred for not complying with the provisions of S. 262 of the District Municipalities Act, is one which cannot be raised for the first time in revision under S. 25 of Act IX of 1887.

* C. R. P. No. 379 of 1902.

6th August 1903.

1. I. L. R., 14 M. 386.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Kurnool in S. C. S. No. 427 of 1901.

T. Subramania Aiyar for *P. S. Sivaswami Aiyar* for petitioner.

T. V. Seshagiri Aiyar for respondent.

The Court delivered the following

JUDGMENT :—It is urged that as the notice sent by the plaintiff to the Municipal Council of Kurnool on the 7th September 1901 was obviously defective the suit should have been dismissed. The notice was defective in that it did not, as required by S. 261 of the District Municipalities Act, specify the amount claimed as compensation or damages. I am, however, of opinion, that applying the principle on which the decision in *Eales v. Municipal Commissioners of Madras*¹ was decided it should be held that the District Munsif was right in not dismissing the suit on the ground that the amount of the loss or damage sustained was not clearly specified in the notice, especially as it is shown that when on the Municipal Council having informed the plaintiff that the notice was defective, he asked them to inform him in what respect it was wanting and that they took no notice of his not unreasonable request. It is further contended that the provisions of S. 262 of the Act are a bar to the present suit. It is admitted that this point was not taken before the District Munsif. I am of opinion that it is not advisable in revision of a decree passed under the Small Cause Courts Act to go into a question such as this unless it appears that it was duly raised when the suit was before the Small Cause Court. In order to decide if the objection now put forward is a valid one or not, the main question to be considered would be whether the provisions of the Municipal Act have in substance and in effect been complied with. Such a question would be mainly one of fact on which evidence would have to be considered by the Court. In the absence of such evidence it is not possible for this Court as a Court of revision to adjudicate on the matter.

It is finally urged that this suit was barred by limitation. As it appears that the distress took place in August 1901 and that the suit was filed before the close of that year, it is clear that there can be no bar by limitation.

[His Lordship finally dismissed the petition—*Ed.*]

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Bhashyam Aiyangar.

Venkatasamy Naidu *Plaintiff.**

v.

Rangasamy Naidu *Defendant.*

Venkatasamy Naidu
v.
Rangasamy Naidu.

Contract Act, S. 25—Natural love and affection—Registered instrument—Undertaking to discharge debt of another—Enforceable obligation—Failure to discharge—Payment by another—Right to recover from person undertaking.

Where by a registered instrument a person on account of his natural love and affection for his brother undertook to discharge the debt due by his brother to a third person there is an enforceable obligation under S. 25 of the Contract Act.

Upon failure of the brother to discharge it, the person may pay the debt and recover the amount to be paid from his brother.

Case stated under S. 69 of the Presidency Small Cause Courts Act XV of 1882, by the Chief Judge of the Madras Court of Small Causes in Suit No. 16489 of 1900 referring for decision whether on a proper construction of the document marked as Exhibit A in this suit the defendant was legally bound to discharge the debts mentioned in Schedule B thereto.

K. Narayana Rao for plaintiff.

P. R. Sundara Aiyar for defendant.

The Court expressed the following

OPINION :—We are of opinion that the defendant is legally bound. In Exhibit A the defendant who was a party thereto, although he did not sign it, undertook to discharge the debt of Rs. 1,704-3-6 due by the plaintiff to Krishnasamy Naidu. The defendant having failed to discharge it, the plaintiff himself paid it and now seeks to recover it from defendant.

Assuming for the sake of argument that the defendant's undertaking was not founded on valuable consideration, but only on good consideration, viz., love and affection for his brother (the plaintiff), Exhibit A having been registered, the breach of such obligation becomes actionable under S. 25 of the Indian Contract Act. The costs of this reference will be costs in the cause.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :--Mr. Justice Subrahmanya Aiyar and Mr. Justice Boddam.

Sankarachariar of Kumbakonam by his
Agent Pattabhirama Aiyar ... Petitioner* (*Plaintiff*).

v.

Varada Pillai ... Respondent (*Defendant*).

Rent Recovery Act, Ss. 4, 8, 9 and 82—Patta accepted for a long series of years—Estoppel—Alienation—Provision to pay tirra jasti if tenant should cultivate wet crops on dry land—Fees payable to village servants—Immemorial usage—Power of landlord to recover by summary process—Interest—Provision that tenant should remove produce after paying rent—Propriety of patta—Uncertainty of terms in patta—Contract not opposed to law—Test of uncertainty.

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Where a patta, containing certain terms which are now objected to by the tenant for the first time, has been tendered by the landlord and accepted by the tenant for a series of years without objection, the tenant is estopped from subsequently disputing the propriety of the patta in a suit for rent although he may not have accepted it for the year in question.

The conduct of the tenant in accepting patta in the previous years amounts to an implied representation that the patta so tendered and accepted is proper.

Such representation is not as to a matter of belief or opinion.

The estoppel continues against the tenant until the latter withdraws his representation by communicating to the landlord that he objects to the terms in question in time to permit the latter to tender a proper patta or to sue to settle the terms thereof under S. 9 of the Rent Recovery Act.

A provision in the patta that if the tenant raise nunjah crop on punjah land with sircar water he should pay rent payable on neighbouring nunjah land is not indefinite and is, therefore, not bad for uncertainty.

It is proper to define in a patta the terms of the tenancy with reference to a possible contingency which may arise in the course of the fasli for which the patta is tendered.

There is a material distinction between the power of a court in dealing with questions raised in a suit under S. 8 or S. 9 of the Rent Recovery Act not settled by contract nor specifically provided for by law and its power in dealing with a litigation arising out of a contract constituted by an accepted patta.

In the former the court has to decide with reference to its view of what is fair and proper under all the circumstances while in the latter the court has only to decide whether the terms are obnoxious.

The test in determining whether the terms in a patta are certain is to see not whether the terms are in themselves certain, but whether they are capable of being made certain.

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The maxim of the law to be applied in such cases is *Id certum est quod reddi certum potest*.

According to the immemorial custom of the country, the fees due to the village servant and other public servants of the village are payable out of the produce of the land and in a majority of cases it is the landlord that has to collect and pay them over to the servants concerned.

A provision in the patta therefore that the payment of the customary fees or *merais* payable by the tenant along with rent in connection with the services of the village accountant, &c., will also be enforced by proceedings under the Act and is not improper and a stipulation that interest will be charged on arrears on such fees is also enforceable.

Although such fees may not be rent in the sense in which the landlord can appropriate them for himself, still so far as their recovery is concerned, they must be treated as part of rent under S. 4 of the Rent Recovery Act.

A provision in the patta that the tenant should remove the produce after paying the rent is not an illegal one and is binding upon the tenant if he contracts to that effect though it will not be upheld in a suit under S. 9.

The provision in S. 82 of the Rent Recovery Act empowering the Collector to take security from the tenant for the rent shows that a contract of such a nature it is not opposed to law.

Per *Boddam, J.* :—The facts alleged are not incapable of supporting a case of estoppel by conduct, but estoppel cannot arise unless it is proved that the landlord's position has been altered in consequence of such conduct.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Poona-mallee in S. C. S. No. 323 of 1902.

In suits for rent for a *fasli* for which patta had not been accepted but only tendered, the tenant pleaded the impropriety of patta in certain respects which will appear from the judgment reported below. The patta had been accepted by the tenants without objection for a long series of years and in addition to supporting the propriety of the patta the plaintiff contended that the defendant was estopped from pleading the impropriety of the patta by his acceptance in previous years. The District Munsif held that the patta was improper, that there was no estoppel and dismissed the suit. Hence this revision petition.

P. S. Sivaswami Aiyar and *T. R. Venkatarama Sastri* for petitioner.

V. Krishnaswami Aiyar for respondent.

P. S. Sivaswami Aiyar.—The defendant's conduct in previous *faslis* implies a representation that he will not dispute the propriety

of the patta. (*Subrahmania Aiyar J.* The patta was not accepted in this year.) No, it was not accepted. The defendants having accepted the patta for a number of years, are estopped from springing this objection for the first time in the plaint fasli. See S. A. No. 1331 of 1901 (unreported). (*Subrahmania Aiyar J.* The court seems to treat the case as one of implied agreement).

I would put this case both ways, (1) as estoppel, (2) as an implied agreement.

As to the objections to the patta itself, the first is, that the claim "if you raise nanja cultivation with punja land with sirkar water, you shall pay nanja assessment at the rates payable on neighbouring nanja lands." The Munsif holds it to be indefinite on the authority of *Venkataramanjulu Nayudu v. Ramachandra Nayudu*.¹ But in *Sattappa Pillai v. Raman Chetti*² it was held otherwise. (*Subrahmania Aiyar J.* There the rates were mentioned in the patta). In C. R. P. No. 444 of 1898 such a clause as this was held not bad for indefiniteness.

The second is the provision that the landlord will proceed summarily for rent as well as merais. A statement of the remedies that the landlord has under the law is not a term at all and the patta is not improper on that account. Merai is a part of rent (S. 4 of the Act). The next section that has a bearing upon the point is S. 14. The very anomaly of the landlord having to seek his remedy in one court with regard to a portion, and in another court with regard to the rest is enough to throw doubt upon the Munsif's decision.

The next objection is to interest being charged on merais. S. 4 and S. 37.

The last objected clause is that the crops should be appropriated by the tenant only on his paying the landlord's rent. I would refer to S. 82, under which the landlord can apply to the Collector for taking security from the tenant for the rent.

V. Krishnaswamy Aiyar.—The last clause has been held objectionable in *Appa Rau v. Ratnam*³ and *Venkata Narasimha Naidu v. Ramasami*⁴. In the patta there are four instalments fixed which run up to April. The provision is not "having paid such and such an instalment, you shall take possession of the produce." It is after paying the rent as per patta that he is to take possession. *Appa Rau v. Ratnam*³ is a case of one instalment. That is a suit under S. 9.

1. I. L. R., 7 M. 150.

2. I. L. R., 17 M. 1.

3. I. L. R., 13 M. 250.

4. I. L. R., 18 M. 216.

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*Venkata Narasimha Naidu Ramasami*¹ is also a suit under S. 9. The provision in this case is worse than the one in those cases. To say that the tenant is to pay and then take the harvest is inverting the order of things. With reference to the other clause as to nanja rent on neighbouring lands it is more indefinite than the words in *Venkat-ramanjulu Nayudu v. Ramachandra Nayudu*². S. 4 provides that the patta shall contain the amount and rates of the rent. The object of the section is to prevent the landlord from tyrannising over the tenant by indefinite terms. The case in *Sattappa Pillai v. Raman Chetti*³ has no bearing. The fees are not payable *as rent*. S. 4. The word 'including' goes with 'payment'. The legislature often says rent shall include such and such. The words are "payable *with it*." Fees payable *with* rent cannot be included *in* rent. Interest cannot be charged if the fees are not rent. There is no question of estoppel. S. A. No. 1331 of 1901 has no bearing. No case of implied contract has been set up by the plaintiff. There can be no estoppel as to rates of rent. I would refer also to *Ramasami v. Rajagopala*⁴ and *Sri Parapu Ramanna v. Mallikarjuna Prasada Naidu*⁵ where the stipulation though contained in previous pattas, was held bad and no estoppel was allowed.

P. S. Sivasawmi Aiyar in reply.

The Court delivered the following

JUDGMENT :—SUBRAHMANIA AIYAR, J —In this case the suit was brought by the petitioner, a landlord, against the defendant, his tenant, for the recovery of rent of the Fusli year 1310. Before suit a patta had been tendered, but was not accepted. At the trial the defendant urged that certain terms in the patta, to be referred to and considered later on, were such as to entitle him to refuse to accept the patta. The District Munsif agreed with the contention and dismissed the suit. The petitioner whilst denying that the terms of the patta referred to were open to such objection contended that, even if they were, the defendant was estopped from raising any such question in the present suit inasmuch as pattas containing precisely similar terms had been accepted for a series of years in respect of the same holding.

1. I. L. R., 18 M. 216.

2. I. L. R., 7 M. 150.

3. I. L. R., 17 M. 1.

4. I. L. R., 11 M. 200.

5. I. L. R., 17 M. 43.

Without taking any evidence as to the truth of the allegations on which this contention was based the District Munsif held that even assuming the allegations to be true they could not support a plea of estoppel. Is this conclusion sustainable? Now there can be no doubt that if previous to the year to the rent of which the suit relates, the tenant had in express terms told the landlord that pattas containing the terms objected to were to be taken as proper pattas and that the landlord might act on that footing the tenant would be precluded from impugning similar pattas tendered subsequently unless and until he had withdrawn his previous representation by communicating to the landlord that he objected to the terms in question in circumstances permitting the latter *suing* the former in time to obtain an adjudication under S. 9 of the Rent Recovery Act as to the terms of a proper patta and to compel the acceptance of such a patta for the year in respect of which the tender was duly made.

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It follows that, if the allegations on behalf of the petitioner about the acceptance for a series of years of precisely similar pattas be true, that constituted a representation by conduct that the landlord might proceed on the footing that the pattas were proper ones, which, of course, would have the same effect as a representation in so many words.

It is in the interests of the tenant that the law imposes on the landlord the duty of tendering a patta setting forth the various matters referred to in S. 4 of the Rent Recovery Act. It being open to the tenant to refuse to take any patta containing terms not considered by him proper, no other conclusion is possible when the patta is accepted than that the tenant asserts by implication that the patta is or may be taken to be a proper one especially when this conduct is repeated from year to year.

The District Munsif thought that the representation, if any, in cases like this relates only to a matter of belief in the tenant's mind. Now take the case of a tenant who though fully aware that a particular term in a patta was open to objection nevertheless for reasons of his own takes the patta without demur. In such a case is not the representation in respect of what by itself is no other than a fact *viz.*, the propriety of the patta irrespective of the belief one way or the other of the tenant as to that matter. In other words the case may virtually be taken to stand thus. The land-

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lord asks the tenant "may I take this patta to be correct?" The tenant replies in the affirmative. What question of belief or opinion arises here? In my view none.

It has now to be observed that there is nothing in the nature of any of the terms in question to preclude the application of the doctrine of estoppel to the case, if the plaintiff substantiates his allegations; for, as will be shown at once, none of them is necessarily illegal, but they are one and all such as the tenant may have assented to so as by such assent to have made a patta containing them a valid contract between himself and his landlord.

Turning now to the items objected to, the first runs as follows: "If you raise nunjah cultivation on punja land with Sircar water, you shall pay therefore *tirva jasti* according to the *tirva* of neighbouring nunjah land." This was held by the District Munsif to be bad for indefiniteness; but I cannot agree. In *Sattappa Pillai v. Raman Chetty*¹ it is pointed out (at page 7) that it is proper to define in a patta the terms of the tenancy with reference to a possible contingency which may arise in the course of the fasli for which the patta is tendered. The case contemplated by the term under consideration is such a contingency. The landlord could not know beforehand whether the tenant would in the particular year raise wet crops on dry land with the aid of water supplied by the landlord or what specific lands would be used for the purpose. In such circumstances how can the landlord be expected to say more than that on the contingency *happening* nunjah rates would have to be paid. That, had the landlord contented himself with simply saying so, such provision in the patta would be held valid, is clear from the case just referred to and a provision in those terms would, I think, be understood as referring to rates payable on neighbouring lands which would ordinarily be of similar quality. How then can the express mention of what otherwise would be implied make any real difference? If it does, one would think that the clause were thereby rendered more definite rather than the contrary. It may not here be out of place to say that the phraseology of the clause in question is substantially what the Legislature itself adopts as a proper criterion for the determination of the rate of rent in certain circumstances (see Rule III in section 11 of the Rent Recovery Act).

1. I. L. R., 17 M., p. 1.

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My conclusion on this point is confirmed by the decision in the numerous cases which came up to this court from the Sivaganga Zemindary in regard to a provision in pattas tendered by the landlord but refused by the tenants to the effect that on failure of tenant to raise paddy crop upon wet land, he should pay half varam calculated on the average yield of such nunjah lands in the village or on the average yield of adjoining lands. This was held to be a proper provision (see C. R. P. No. 327 of 1894). The decision in *Ramasami v. Rajagopala*¹ on which the learned pleader for the respondent laid stress were in suits under section 7 of the Rent Recovery Act, and the case in *Rimanuja v. Ramachandra*² stands on the same footing. There can be little doubt that there is material distinction between the power of the court in dealing with questions raised in a suit under section 8 or 9 of the Act not settled by contract or specifically provided for by law and its power when dealing with a litigation arising out of a contract constituted by an accepted patta. In the former case the law gives to the court greater latitude than in the latter. In the one the court has to decide the question with reference to its view of what is fair and proper in all the circumstances while in the other the court has only to decide whether the terms are obnoxious to the general law of contract and consequently altogether unenforceable. And it is scarcely necessary to say that in determining objections founded on the alleged uncertainty of a term in a contract the test to be applied would be not whether the term is in itself certain but whether it is capable of being made certain (*Id certum est quod reddi certum potest*). Judged by that test it is impossible to hold that such a term as that under consideration occurring in a completed contract would be void for uncertainty.

The next objection relates to the provision in the patta that the customary fees or merais payable by the tenant along with the rent in connection with the services of the village accountant, and certain other public servants of the village would also be summarily proceeded for and charged with interest if in arrear. The District Munsif held that these fees were not recoverable by summary process and that interest could not be charged thereon and that therefore this clause in the patta was improper. I disagree with

1. I. L. R., 11 M., p. 200.

2. I. L. R., 7 M., p. 150.

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him here also. According to the immemorial custom of the country these fees are generally payable out of the produce of the land, and in the majority of cases it is the landlord that has to collect and pay them over to the servants concerned. Though not rent in the sense in which he could appropriate them himself, yet in so far as their recovery is concerned that they are to be treated as part of the rent is clear from S. 4 of the Act which provides for the mention in the patta of the amount and nature of the rent including any fees or charges payable with it according to established usage. Were the fees to be taken as absolutely distinct from the rent, the expression 'including' would not have been used; and it is impossible to believe that the legislature, while compelling the landlords to make the patta comprehend such fees, intended to disable him from recovering them by the process admittedly applicable to rent proper or to preclude him from charging interest at the same rate on both. It is hardly necessary to add that the inconveniences which would arise from such construction of the Act would be grave and manifest. S. 52 of the Revenue Recovery Act which provides for the recovery by summary process of emolument due to village servants, indicates that the policy of the Legislature is in the direction of facilitating the collection of fees like those under consideration otherwise than by suits (See *Collector of North Arcot v. Nagi Reddi*¹, where it was held that an accountant even in a permanently settled Zemindari village came within the provision).

The last clause objected to refers to the tenant removing the produce after paying the rent and obtaining a receipt. It must be admitted that if the question were whether in a suit under S. 9, this provision would be upheld in the absence of a contract, the answer would be in the negative. But there is nothing to prevent a tenant contracting to be bound by such a provision. S. 82 of the Rent Recovery Act referred to on behalf of the petitioner is enough to show that such a contract would not be opposed to law.

The two cases cited from *Bhupathi v. Raja Rangayya Appa Row*² and *Sri Parapu Ramanna v. Mallikarjuna Prasada Naidu*³ may now be referred to. The former seems to have no bearing on the present question. The latter in so far as it was relied on as being relevant here decided only that a pay-

1. I. L. R., 15 M. p. 35.

2. I. L. R., 17 M. 54.

3. I. L. R., 17 M. 43.

ment for a series of years of certain fees which, in their nature, were voluntary (certain temple fees) could not warrant the conclusion that there was an implied contract to pay them. In neither of the cases was any plea of estoppel such as that advanced here raised, and it is difficult to see how such a plea could have been allowed to be raised in the suits governed as they were, by S. 9 of the Rent Recovery Act, according to which the court has to decide what the terms of the patta should be. On the other hand, S. A. No. 1331 of 1901 to which our attention was drawn on behalf of the petitioner is a clear and direct authority in favour of his contention on the point.

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The conclusion of the District Munsif on the question of estoppel, therefore, is, in my opinion, unsustainable.

I would set aside the decree of the District Munsif and remand the case for disposal with reference to the plea of estoppel in the light of the observations made above, and with reference to the other questions arising in the case.

The costs of this petition will abide the result.

BODDAM J.—I am not prepared to hold that the allegations made on behalf of the plaintiff are incapable of supporting a case of estoppel by conduct on the part of the defendants, but I am not, by any means, clear that they are sufficient to constitute such an estoppel unless upon evidence being taken it is proved that the plaintiff's position has been altered in consequence of the alleged conduct of the defendant upon which the estoppel is based. I think, therefore, that evidence should be taken and the exact facts established before the case is disposed of and I agree that the District Munsif was wrong in the circumstances to dismiss the suit without taking any evidence that might be tendered on either side.

As regards the objections to the patta, I agree in the observations of *Sir Subramania Aiyar J.* I would set aside the decree of the District Munsif and remand the case for disposal according to law. The costs of this petition will abide and follow the event.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar, and Mr. Justice Bo²dam.

Sankarachariar of Kumbakonam by

his Agent A. Pattabhiramier ... Petitioner* in all cases
(Plaintiff).

v.

Murugesu Mudaliar

...

... Respondent in C. R. P.

No. 460 of 1902,

(Defendant).

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chariar
v.
Murugesu
Mudaliar.*Jurisdiction—Transfer of suits from original side to small causes side—Judge being invested with small cause jurisdiction subsequent to the filing.*

Where a suit is filed on the regular side and the presiding judge is subsequently invested with small cause jurisdiction, an order transferring the suit from the regular to the small cause side is erroneous and must be set aside.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decrees of the Court of the District Munsiff of Poonamallee in S. C. S. Nos. 537 and 538 and 539 of 1902 respectively.

P. S. Sivaswami Aiyar and T. R. Venkatarama Sastri for petitioner.

V. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The order of the District Munsif transferring these suits from his regular file to the small cause side was improper. We must therefore set aside his order and decree that the suits be restored to his file on the regular side and proceeded with according to law.

Costs of these petitions will abide and follow the event.

* C. R. P., Nos. 460 to 462 of 1903.

14th August 1903.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Boddam.
 Veeranna Pillai and another ...Appellants* (*Defendants. 1 and 2*).

v.

Muthukumar Asari and others.. Respondents (*Plaintiffs and 1st
 Plaintiff's legal representatives*).

*Civil Procedure Code, Ss. 13 Explanation II and 43—Usufructuary mortgage—No
 covenant to pay—First suit for recovery of money by sale dismissed—Second suit
 for possession—Different cause of action—Necessity of plaintiff to unite all causes
 of action—Res judicata—Misjoinder.*

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Where a usufructuary mortgagee brought a suit for recovery of the mortgage-
 money by sale of the mortgaged property impleading his own lessee as defendant
 and this suit was dismissed on the ground that no such suit would lie, a second suit
 by such usufructuary mortgagee for recovery of possession of the mortgaged property
 was barred neither by S. 43, C. P. C., nor by the rule and principle of res-judicata
 S. 13, Explanation II.

The causes of action in the two suits are distinct and different and neither S. 43
 nor S. 13, Explanation II will apply in such a case.

A plaintiff is not bound to make every cause of action he may have at the date
 of the first suit in respect of the property then litigated a ground of attack.

Explanation II to S. 13 has not changed the law.

*Kameswara Pershad v. Rajkumari Ruttun Koer*¹ explained.

*Arunachella Chetty v. Meyyappa Chetty*², dissented from.

S. A. No. 777 of 1901 followed.

If a plaintiff in addition to a prayer for recovery of money by sale of the mortgaged
 property had also asked for possession, there would be a clear case of misjoinder of
 causes of action.

Appeal from the order of the Subordinate Judge's Court of
 Madura (West), dated 7th July 1902 in A. S. No. 613 of 1901, pre-
 sented against the order of the Court of the District Munsif of
 Tirumangalam, dated 17th October 1901 in O. S. No. 632 of 1900.

V. Krishnaswami Aiyar for appellants.

P. S. Sivaswami Aiyar for respondents.

V. Krishnaswami Aiyar.—The cause of action for the money and
 that for possession of the property is the same. A man contracted
 to deliver goods (1,000 bags). He delivers 500 bags of inferior qua-
 lity, and 500 he does not deliver. It has been held that the cause
 of action is one and the same. *Duncan Brothers & Co., v. Jeetmull
 Greedharee Lall*.³ Here under one and the same contract a person
 has got 2 remedies. He has got a right to possession, and if pos-
 session is not given, a right to the money, 26 B is not applicable to

* C. M. A. No. 132 of 1902.

14th August 1903.

1. I. L. R., 20 C. 79.

2. I. L. R., 21 M. 91.

3. I. L. R., 19 C. 372.

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maru Asari.

this case. Supposing he alleges a covenant and some ten years after he is dispossessed He brings a suit for the money on the covenant. That is dismissed. A subsequent suit for possession on the mortgage will be barred by S. 43, C. P. C., (*Subrahmania Aiyar*, J.—I do not know if it will be barred. For the limitation in the two cases will run from different dates). That limitation begins to run from different dates is no criterion. Take two instalments accruing due on different dates. S. 43 will be a bar, even if it is a different cause of action. I reply upon *Kameswara Pershai v. Raj Kumari Ruttan Koer*¹; *Arunachella Chetty v. Meyyappa Chetty*²; *Imam Khan v. Ayub Khan*³; *Rangasami Pillai v. Krishna Pillai*⁴. The decision in S. A. No. 777, of 1901 does not answer *Arunachella v. Meyyappa*² and overrules *Rangasami v. Krishna*⁴.

P. S. Sivaswami Aiyar :—

I rely upon S. A. No. 777 of 1901. The cause of action in this suit is the denial and refusal to surrender possession of my title as mortgagee which is good as against all trespassers, and I am entitled to maintain this suit.

The Court delivered the following

JUDGMENT :—SUBRAHMANIA AIYAR, J.—The plaintiffs in the present suit had brought a previous suit O. S. No. 510 of 1898 on the file of the District Munsif's Court of Madura, against nine persons inclusive of the first two defendants in the present suit who were the 8th and 9th defendants therein. The plaint in that suit, in effect, stated that on the 9th August 1864, Suppan Asari, father of the plaintiffs in that suit, had for the sum of Rs. 245, stipulated to be re-paid in 3 years, obtained from Palani Kumaru Pillai, grandfather of the then 1st and 3rd defendants and father of the 2nd defendant's husband and Muthukaruppa Pillai, father of the then 4th and 5th defendants, a mortgage of the lands now in dispute, which had vested in the mortgagors to the exclusion of third brother, the then 6th defendant, father of the 7th defendant; and after certain other averments, to which reference will be made later on, prayed for a decree for re-payment of the mortgage amount, as well as of certain other sums subsequently advanced on the condition that they were to be re-paid along with the mortgage amount, and for an order for sale of the mortgaged property.

1. I. L. R., 20 C. 79.

2. I. L. R., 21 M. 91.

3. I. L. R., 19 A. 517.

4. I. L. R., 22 M. 259.

That suit was eventually, so far as appears, dismissed on the ground that the alleged mortgage was a purely usufructuary mortgage which contained no covenant to pay and that being so, no suit for the money or for the sale of the land could be maintained.

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maru Asari.

In the present suit the plaintiffs refer to their alleged title to the lands in question as mortgagees, much in the same terms as in the previous plaint and proceed to state that the present 1st defendant (eighth formerly) though let into possession as a tenant by the plaintiffs is setting up title in himself and that he and the 2nd defendant (ninth formerly) who got possession through him refuse to surrender the land; and pray for a decree for possession of the lands and mesne profits. The plaint states as an alternative ground for the reliefs claimed that, even should the plaintiffs fail to make out the letting alleged, they are entitled to recover on their title as usufructuary mortgagees under the said instrument of the 9th August 1864.

The lower appellate Court has held that the present suit was not barred by the previous suit.

On behalf of the appellants (1st and 2nd defendants) this conclusion was impeached, it being urged that the suit was barred under the provisions of S. 43, Code of Civil Procedure, or S. 13, Explanation II or both.

The law as to questions of bar under these provisions was in S. A. 777 of 1901 (decided very recently) discussed at great length, and all the previous important authorities bearing on the subject were fully reviewed and examined, and I need only say that I entirely concur in the conclusions arrived at therein. Though I did share in the view that some of the observations of the Judicial Committee in *Kameswara Pershad v. Rajkumari Ruttan Koer*¹ warranted the notion that Explanation II to S. 13 of Civil Procedure Code had introduced a change in the law of *res judicata* in so far as plaintiffs were concerned, so as to make it incumbent on them to make every cause of action relating to the property in litigation and existing at the time of the suit, a ground of attack, the result of such a course was likely to lead to confusion and whatever may be the correct interpretation to be put upon the language of

1. I. L. R., 20 C. 79.

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maru Asari.

the Judicial Committee in the above case had it stood by itself yet, having regard to other pronouncements by the same tribunal reaffirmed subsequently to the said decision, such notion can no longer be taken to be well-founded. Consequently, speaking for myself anything in the language used in the judgment in *Arunachella Chetty v. Meyyappa Chetty*¹ inconsistent with the view of the law as expounded in the recent decision of this court above referred to can no longer be treated as of any authority.

Turning now to the appellant's contentions here, there can be no doubt that they are unsustainable. The rights which were the subject of litigation in the suit of 1898 were an alleged right to recover a sum of money on a covenant which, it was found, did not exist and an alleged right accessional to such covenant, viz., a right to an order for sale. These rights are, of course, absolutely different from what are now sought to be made the subject of adjudication, viz., the right to eject a tenant and another claiming through him on the ground of the tenants' denial of the landlord's title and the right of a mortgagee to possession under a purely usufructuary mortgage, which latter necessarily negatives a right to recover money on a covenant to pay or to obtain an order for sale. The rights in respect of which the plaintiffs now demand judgment, in other words, the causes of action now sued upon, being thus entirely different from the rights or causes of action to which the previous suit related, S. 43 of the Civil Procedure Code, which simply enjoins that the whole claim arising out of the same cause of action should be included in the suit can have no application. Next, as to the objection raised with reference to Explanation II to S. 13, no doubt, in the plaint in the suit of 1898 reference was made, among other things to the possession of the mortgaged lands by the plaintiff, to a letting by them of the lands to the then 8th (present 1st) defendant, and to the latter denying his alleged landlord's title and setting up a claim to the property himself. But, though those averments may have been relevant as a reason for the inclusion of the 8th and 9th defendants in the suit in order to get an order for sale binding on them, yet it is manifest that in that suit the plaintiffs could not, on the basis of

1. I. L. R., 21 M. 91.

those averments, have prayed for a decree for possession from the present defendants since that would have been a clear case of misjoinder of causes of action, and consequently the causes of action now relied on were not with reference to the previous suit, 'matters which might and ought to have been made grounds of attack' within the meaning of Explanation II to S. 13 of the Civil Procedure Code, even if the interpretation to be put on *Kameswara Pershad's* case were different from that adopted in the recent second appeal above referred to.

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Asari.

The present objection on behalf of the appellants fails all the more, since according to the decision of this Court already referred to that explanation does not render it incumbent on a plaintiff to combine as grounds of attack every cause of action he may have at the date of the suit in respect of the property sued for, even if it were possible for the plaintiffs to have, consistently with established rules of pleading, claimed for the present reliefs also in the former suit.

The appeal, therefore, in my opinion, fails and I would dismiss it with costs.

BODDAM, J :—I agree that the plaintiffs' suit is not barred under S. 13 or S. 43, Civil Procedure Code. It is not necessary for me to state the facts of the case, or to do more than state my conclusions as shortly as possible after the very full judgment of *Sir Subrahmania Aiyar, J.*

The cause of action in the former suit was to recover the mortgage amount by sale of the mortgaged premises.

The present suit is a suit to recover possession of the land from persons who are in wrongful possession.

Although the 1st and 2nd defendants in the present suit were joined as defendants in the first suit, as persons claiming an interest in the land, the present claim formed no part of the cause of action in that suit, nor was it a cause of action upon which the plaintiffs could rely in the alternative or otherwise in support of the relief they sought in that suit. The cause of action in the present suit is totally distinct and different and therefore the suit is not barred. The appeal should be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam and Mr. Justice Bhashyam Aiyangar.

Manavikraman ... Appellant* (*Plaintiff, Decree-holder*).

v.

Moyankutti... ... Respondent (*Defendant, Judgment-debtor*).

Manavikraman v. Moyankutti. *Civil Procedure Code, Ss. 208 & 259—Decree for moveable property—Alternative decree for money—When alternative enforceable—No option to judgment-debtor.*

Moyankutti. In a decree for moveable property the money amount is inserted under S. 208 as an alternative if delivery cannot be had.

The judgment-debtor is given no option in such a case either to surrender the property or to pay the money.

The alternative portion of the decree (for recovery of the money) only comes into operation when after putting in force S. 250 C. P. C., it is found impossible to obtain the property ordered to be delivered.

Appeal from the order of the Subordinate Judge's Court of South Malabar at Calicut, dated 19th December 1902 in A. S. No. 546 of 1902, presented against the order of the Court of the District Munsif of Manjeri in M. P. No. 632 of 1902.

P. R. Sundara Aiyar for appellant.

C. Sankara Nair for respondent.

The Court delivered the following

JUDGMENT:—The decree of the Subordinate Judge is clearly wrong. The Judgment-debtor gets no option under a decree for the return of moveable property. The money amount inserted in the decree is inserted under S. 208 of the Civil Procedure Code which requires that an amount of money should be inserted in the decree as an alternative if delivery cannot be had. It is therefore only when after putting in force S. 259 of the C. P. C., it is found that it is impossible to obtain the property ordered to be delivered that the alternative amount in the decree comes into operation.

We set aside the decree of the Subordinate Judge and restore that of the District Munsif with costs in this and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH).

Present :—Mr. Justice Subramania Aiyar, Mr. Justice Davies
and Mr. Justice Benson.

Mahalinga Nadar ... Petitioner* in both (*Plaintiff*).

vs.

Ganapati Subbien ... Respondent in C. R. P. No. 188
of 1902 (*Defendant*).

Kaveri ... Respondent in C. R. P. No. 189
of 1902 (*Defendant*).

*Contract Act, S. 176—Limitation Act, Arts. 57 and 120—Pledge of moveable—Right of
pledgee—Maintainability of suit for sale—Limitation—Personal remedy—Right of
hypothecatee.*

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Subbien.

Held (Per Sir Subramania Aiyar J. and Benson J.).—That a pledgee of moveable
property may, notwithstanding he may have the right to sell the property under pledge
under S. 176 of the Contract Act, sue to recover the amount due under the pledge by
sale of the pledged property.

Art. 120 of the Limitation Act governs such a suit for sale, while Art. 57 will
apply to a suit to recover the money personally from the debtor.

*Vitla Kamti v. Kalekara*¹ not followed; *Nim Chand Baboo v. Jagabhundhu Ghose*²
and *Madan Mohan Lal v. Kanhai Lal*³ followed.

Per Davies J. Contra:—A suit at the instance of a pledgee to recover the debt by
sale of the pledged property is not maintainable.

A suit for sale of the pledged property will be barred if a suit for recovery of
the debt personally from the pledgee be barred under Art. 57 as the right to sell is only
accessory to the right to recover the debt. *Vitla Kamti v. Kalekara*¹ followed.

An hypothecatee is entitled to sue to recover by sale.

Petitions under S. 25 of Act IX of 1887 praying the High
Court to revise the decrees of the Subordinate Judge's Court of
Kumbakonam, dated 14th February 1902 in S. C. S. Nos. 2928 and
2927 of 1901.

The Court (the Honourable Sir Charles Arno'd White, Chief
Justice) made the following

ORDER OF REFERENCE TO A FULL BENCH :—My
view is that the case of *Vitla Kamti v. Kalekara*¹ was rightly
decided and that the *ratio decendi* of that case is applicable to the
present case. A different view, however, has prevailed in Calcutta

* C. R. P. Nos. 188 and 189 of 1902.

12th December 1902.

1. I. L. R., 11 M. 153. 2. I. L. R., 22 C. 21. 3. I. L. R., 17 A. 284.

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and Allahabad (See *Nim Chand Baboo v. Jagabundhu Ghose*¹ and *Madan Mohan Lal v. Kanhai Lal*²).

I accordingly refer to a Full Bench the question whether the period of limitation in this case is governed by Art. 57 or Art. 120 or any other and which article of the Limitation Act.

R. Subramania Aiyar for petitioner.

K. Ramachandra Aiyar for *V. Sankaranarayana Sastry* for respondent in C. R. P. No. 188.

K. Ramachandra Aiyar for respondent in C. R. P. No. 189.

The Court expressed the following

OPINIONS :—SUBRAHMANIA AIYAR AND BENSON JJ.—There can be no question but that the plaintiff is entitled to sue for the sale of the property pledged to him, notwithstanding that he is also entitled under S. 176, Indian Contract Act, to sell the property without reference to the Court.

It is obvious that a right to sue for the sale of the property exists even in the absence of a right to sue for a personal decree against the debtor for the money lent. It would be clearly so if it had been agreed between the parties that no personal liability for the debt was to accompany the pledge of the jewels.

It would follow therefore that in a case where both rights exist they are concurrent rights and the right to proceed against the property pledged is not merely accessory to the right to proceed against the debtor personally.

This has been clearly laid down in regard to the right to proceed against immoveable property hypothecated for a debt, *Chetty Gaundan v. Sundaram Pillai*³ and *Kristna Row v. Hachapa Sugapa*⁴. We can see no distinction in principle between that case and cases of pledge, mortgage or hypothecation of moveable property. The attention of the Judges who decided the case *Venkoba v. Subbanna*⁵ was not drawn to these earlier decisions. They were followed in the Full Bench decision which is relied on in *Nim Chand Baboo v. Jagabundhu Ghose*¹ when the learned Judges dissented from *Villa Kamti v. Kalekara*⁶. We think that the law is correctly laid down by the Calcutta High Court in that case. It has been followed in Allahabad in *Madan Mohan Lal v. Kanhai Lal*².

1. I. L. R., 22 C. 21.

3. 2 M. H. C. R., 51.

5. I. L. R., 11 M. 152.

2. I. L. R., 17 A. 284.

4. 2 M. H. C. R., 307.

6. I. L. R., 11 M. 153.

We accordingly answer the question referred to as follows :—

The claim to proceed against the property pledged is governed by Art. 120, and the claim to proceed against the debtor personally is governed by Art. 57 of the second schedule of the Limitation Act.

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DAVIES J. :—This suit was brought for the recovery of money lent to the defendant, and a decree was prayed for (1) directing the defendant to pay the amount, and (2) ordering the sales of the property pledged to the plaintiff by him and payment of the claim out of the sale-proceeds. So far as the suit was for a personal decree against the defendant, it was admittedly barred under Art. 57 of the second schedule of the Limitation Act, and so far as it was for a sale of the pledged property, I am of opinion (as it was ruled in *Viotola Kamti v. Kalekara*¹ that this was merely “an incident in the nature of an accessory to the right to recover the debt” which became barred with the right of suit for that debt.

The case here, is, however, different in one respect from that just quoted. There the property was only hypothecated. Here there was a “pledge” within the meaning of S. 172 of the Indian Contract Act, and the rights of the pawnee (the plaintiff) are governed by S. 176 of that Act—that is, the plaintiff could either sue upon the debt, retaining the pledge, as a collateral security, or he could sell the thing pledged, on reasonable notice to the defendant. His right of suit was barred by limitation, but his right of sale still remained and this was a right secured to him by law which he could exercise without suit. Hence, the suit was not maintainable as there was no necessity for it. This point does not appear to have been considered in *Nimbhand Baloo v. Jagabundhu Ghose*² and *Madan Mohan Lal v. Kunhai Lal*³.

My answer to the reference accordingly is that, so far as the suit was a suit for recovery of the money personally from the defendant, it was barred under Art. 57 of the 2nd schedule of the Limitation Act, and so far as it was a suit for sale of the pledged goods it did not lie, and therefore no question as to limitation arises.

1. I. L. B., 11 M. 153. 2. I. L. B., 22 C. 21. 3. I. L. B., 17 A. 284.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Ramaswami Aiyar and another ... Appellant*
(Plaintiff and his legal representative).

v.

Vythinatha Aiyar and others ... Respondents
(Defendants 1 to 6).

Ramaswami Aiyar v. Vythinatha Aiyar. *Civil Procedure Code (XIV of 1882) Ss 13, Expln. II, 42 and 43—Act VIII of 1859, S. 2 and 7—Res judicata—"Cause of action," meaning of—"Matter directly and substantially in issue," meaning of—"Subjects in dispute," meaning of—Suit upon specific mortgage—Dismissal—Suit upon another mortgage.*

A plaintiff who seeks to redeem a specific mortgage or to eject on a specific lease and fails in such suit on the ground that the mortgage or lease sued on is not proved is not thereby precluded either by reason of S. 43 or explanation II to S. 13 from seeking to redeem the property comprised in the former suit or a specific portion thereof from another specific mortgage or to eject the person in possession on the strength of his title. *Kameswar Prashad v. Rajkumari*¹ explained.

The expression "subjects in dispute" in S. 42 of the Civil Procedure Code does not connote the *corpus* or *object-matter* of a claim but signifies the *jural relation* between the parties to a suit, for the determination of which the suit is brought, i.e., the cause of action or the subject matter of litigation or in other words the right which one party claims as against the other and demands the judgment of the court.

The object of the section is to require the plaintiff to bring forward his whole case as to the matter of litigation on the question of right involved in the suit and not to require him to unite all the causes of action which he may have against the defendant in respect of the *corpus* or *object-matter* of the suit.

The penalty for non-compliance with S. 42 is provided by S. 43 and Expl. II to S. 13.

The expression "matter directly and substantially in issue in" S. 13, will include not only the cause of action on which the suit is based but also all matters which are or ought to be, put in issue for the determination of the cause of action.

Ss. 13 and 43, C. P. C., are not exhaustive of the law of *res judicata* and this law has been the same under both the old and new Codes and is the same as the English Law.

The absence in S. 13 of the Code of 1882 (XIV of 1882) of the expression "cause of action" found in the old Code (Act VIII of 1859 S. 2) does not denote any deliberate change in the law and S. 13 does not require every plaintiff to exhaust in one suit all the causes of action which he may have at the date of the suit in respect of the property or the relief claimed by him and which he may then be aware of.

* S. A. No. 777 of 1901.

15th July 1903.

1. I. L. B., 20 C. 79.

It is not the law that if a plaintiff sued for certain property on a false claim or cause of action, when in reality he has, in fact and law, a true claim and cause of action for the same property, of which he is aware, he must be taken in law to have abandoned or relinquished his true claim and cause of action. *Rangasami Pillai v. Krishna Pillai*¹ treated as overruled by the Full Bench decision in *Kaveri Ammal v. Sastri Ramier*².

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Second appeal from the decree of the District Court of Trichinopoly in A. S. No. 70 of 1899, presented against the decree of the Court of the District Munsif of Srirangam in O. S. No. 27 of 1897.

V. Krishnaswami Aiyar and *K. Balamukunda Aiyar* for appellants.

T. V. Seshagiri Aiyar for respondents.

The Court delivered the following

JUDGMENT:—The plaintiff claiming as the daughter's son and legal representative of one Ramien, deceased, instituted O. S. No. 26 of 1890 (on the file of the District Munsif's Court at Trichinopoly) for the redemption of a usufructuary mortgage of about 50 cawnies of land for Rs. 250. The mortgage was alleged to have been made by Ramien, under an instrument dated 18th March 1856. The defendants, while denying the plaintiff's relationship to Ramien as well as the mortgage sued upon, pleaded that 14 out of the 50 cawnies had been usufructuarily mortgaged to them by Ramien for Rs. 500, under an instrument dated 5th February 1853, and that the same had been sold to them subsequently, as also the remaining 36 and odd cawnies.

Without deciding the question of the plaintiff's relationship to Ramien, the suit was dismissed on the ground that the mortgage sued upon was not proved, and was, in fact, fictitious and the decision was confirmed on appeal. The plaintiff preferred a second appeal and claimed a decree in respect of the 14 cawnies on the footing of the mortgage of the 5th February 1853, which the defendants set up. But the High Court declined to grant such relief on the grounds that the said mortgage was not admitted to be a subsisting mortgage and that the plaintiff not having sued, in the alternative, on that mortgage, no issue could be raised and tried in respect of it, in that suit.

1. I. L. R., 22 M. 259.

2. I. L. R., 26 M. 104.

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The plaintiff brings the present suit substantially against the same defendants for redeeming the 14 cawnies on the footing of the mortgage of the 5th February 1853. The District Munsif found that the plaintiff was the daughter's son and legal representative of the mortgagor, Ramien, and that the sale relied upon by the defendants was not true, and, holding that the suit was not barred as *res judicata* by the previous suit, he decreed redemption in favour of the plaintiff. But the District Judge on appeal dismissed the suit on the ground that, when he brought the former suit, he was aware of the mortgage now sued upon, and that he was, therefore, barred by the rule of *res judicata* from bringing this suit.

In support of this second appeal which has been preferred against the said decision, it is contended that even assuming that the finding of the District Judge that the plaintiff was aware of the mortgage of 1853 when he instituted the former suit cannot be successfully impugned in second appeal, the present suit is not barred by S. 43 or Explanation II to S. 13 of the Civil Procedure Code. In our opinion this contention is well founded and the case must be remanded for disposal on the merits.

The contention of the learned pleader for the respondents in support of the decision appealed against is two-fold : firstly, that under S. 42 and Explanation II to S. 13 of the Civil Procedure Code, a plaintiff should frame his suit so as to include all causes of action which he may rely upon—in the alternative or otherwise—in support of the relief which he seeks and that if he omits to make any of them a ground of attack in the suit, he will be debarred from maintaining a subsequent suit based on the cause of action so omitted ; secondly, that the present suit and the former suit are not, so far as the 14 cawnies in question are concerned, based on different causes of action, but on one and the same cause of action, and that the present claim should, under S. 43, also have been included in the former suit and made a ground of attack (under Explanation II to S. 13, Civil Procedure Code.)

The first contention is mainly based on the argument that the phrase " the subjects in dispute " occurring in S. 42 connotes the *corpus* or object-matter of the claim and that, therefore, all possible claims to the same should necessarily be offered for decision

in the suit. In our opinion the expression 'the subjects in dispute' signifies the jural relation between the parties to the suit, for the determination of which the suit is brought. In other words, the object of S. 42 is to require the plaintiff to bring forward his whole case as to the matter of litigation on the question of right involved in the suit and not to require him to unite all the causes of action which he may have against the defendant in respect of the *corpus* or object matter of the suit. This was first clearly laid down by the Privy Council in *Pittapur Raja v. Surya Rao*,¹ in a case arising under Act VIII of 1859. Referring to S. 7 of that Act (corresponding to S. 43 of the present Code), their Lordships observed as follows :—"That section does not say that every suit shall include every cause of action or every claim which a party has, but every suit shall include the whole of the claim arising out of the cause of action, meaning the cause of action for which the suit is brought." In that case the plaintiff was the devisee of a certain village and also of a certain share in moveable property belonging to the testatrix. The plaintiff, after having obtained possession of the village and having remained in quiet possession thereof for some time, was dispossessed by the defendant. The plaintiff, therefore, brought a suit against the defendant who denied the will and claimed the property as having devolved upon him; but a decree in ejectment was passed in the plaintiff's favour. He afterwards brought another suit to recover from the same defendant, the share of personal property which had been bequeathed to him under the same will but had been withheld from him. The Judicial Committee, in overruling the plea of *res judicata* which was relied upon as a bar to the second suit, held that the claim in respect of a share in the personalty was not one arising out of the cause of action which existed in consequence of the defendant having improperly turned the plaintiff out of possession of the village and that it was a distinct cause of action altogether and did not at all arise out of the other; and in distinguishing *Moonshee Buzloor Ruheem v. Shumsounnissa Begum* and *Jadonath Bose v. Shumsounnissa Begum*² which was relied upon in support of the plea of *res judicata*, their Lordships observed as follows :—

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"It is not like the case of the conversion of several things. There the act of conversion of the several things is one cause of

1. I. L. R., 8 M. 520; (S. C.) L. R. 12 I. A. 116. 2. 11 M. I. A. 551 at 553.

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action and you cannot bring an action for the conversion of one of the things and a separate action for the conversion of another. The conversion of the whole is one claim and one cause of action".

The above decision was relied upon and followed by the same tribunal in *Amanat Bibi v. Imdad Hussain*¹. In the former case the first suit was brought to recover the land in dispute from the defendant (the talukdar) on the ground that the plaintiff was entitled to the same as under-proprietor. The suit was dismissed on the merits. The second suit was brought to recover the property as proprietor, on paying to the talukdar the arrears of revenue paid by him to Government, treating the same as having been paid on his account. This suit was also dismissed on the ground that a conditional sale by the plaintiff to the talukdar in February 1853 had become absolute about the end of 1853. The third suit was brought to recover the same property on the basis of a mortgage, made to the talukdar in June 1854, alleging that the mortgage debt had been satisfied, but offering to pay any balance that might be found due on taking accounts. Their Lordships of the Privy Council, in overruling the plea of *res judicata* under S. 13 of Act X of 1877, and the plea under S. 7 of Act VIII of 1859, observed as follows :—"Is that determination a bar to this suit, founded as the suit is, on a mortgage recognized as subsisting in 1854. The S. 13 of the Act of 1877, as amended by the Act of 1879, which is applicable to the case, is in these terms :—'No court shall try any suit or issue in which the matter directly and substantially in issue having been directly and substantially in issue in a former suit in a Court of competent jurisdiction between the same parties or between parties under whom any of them claim, litigating under the same title, has been heard and finally decided by such Court.' Now what was the question in issue in the former suit? The question was whether the plaintiff was entitled to recover the property which had been transferred by the Government to the talukdar, on re-paying to the talukdar the arrears of revenue which he had paid to Government. The matter in issue in this suit is the respondent's right to redemption under a mortgage deed. It may be difficult to reconcile the position of the talukdar as mortgagee in 1854 with his position as absolute owner in 1853

1. L. B., 15 I. A. 106.

under a purchase from the mortgagor. But if it be established that the respondent was mortgagor in 1854, with the right of redemption, why should he be barred of his right merely because at an earlier date he may have had no right to the property at all? Then comes the question was the respondent bound to have brought forward his present claim in the former suit? S. 7 of Act VIII of 1859 is in these terms:—‘Every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained’. That section has already been under the consideration of this Board in *Raja of Pittapur v. Surya Rao*, and the commentary upon it is:—‘That section does not say that every suit shall include every cause of action or every claim which the party has, but every suit shall include the whole of the claim arising out of the cause of action—meaning the cause of action for which the suit is brought’ The respondent’s present claim certainly did not arise out of the cause of action which was the foundation of the former suit”².

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These decisions were no doubt passed when the old Code of Civil Procedure (Act VIII of 1859) was in force; but an examination of the different sections of the present Code bearing upon this question also leads to the same conclusion. S. 50 (of Act XIV of 82) which prescribes the essential particulars of a plaint lays down, in Clause (d), that the plaint must contain a plain and concise statement of the circumstances constituting the cause of action and where and when it arose. S. 42 provides that every suit shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute (thus preventing further litigation concerning them). Reading this in the light of the next following S. (43) and of S. 50, Clause (d), it is clear that the expression ‘subjects in dispute,’ means the cause of action or the subject matter of litigation, that is, the right which one party claims as against the other and demands the judgment of the Court upon (*Borst v. Corey*, 15 New York 509; *Jacobson v. Miller*, 41 Michigan 93). The penalty for non-compliance with S. 42 is provided for

1. L. R. 12 I. A. 116; I. L. R. 8 M. 520. 2. L. R. 15 I. A., at pp. 111 and 112.

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partly in S. 43 and partly by Explanation II to S. 13. The former provides that if the plaintiff omits to include a portion of the entire claim which has arisen at the date of the suit, out of the cause of action on which the suit is based, he shall be precluded from suing again in respect of such portion; and the latter provides that the matter of every ground which the plaintiff might and ought to urge in support of the cause of action on which the suit is founded shall be deemed to be a matter directly and substantially in issue in the suit and decided therein whether such ground was actually relied upon or not in the suit. In other words, S. 43 requires that the whole claim which has arisen, at the date of the suit, out of the cause of action, should be included in the suit so as to avoid splitting of a claim or claims arising out of one and the same cause of action. And Explanation II to S. 13 enjoins that every ground which could and ought to have been urged in support of the claim actually made in the suit shall be deemed to have been adjudicated upon therein, whether it was actually urged or not. The explanation has introduced no innovation in the law of *res judicata*; nor does the Code attempt to define what are the matters which might and ought to be made grounds of defence or attack in every suit commenced by a plaint framed in accordance with Ss. 42, 43 and 50.

The whole law bearing upon the question now under consideration has been critically examined and elucidated by *Scotland, C. J.* and *Holloway, J.* in *Chinnaya Mudali v. Venkatachalam Pillai*¹ and the application of that decision to *Muthumadeva v. Sevattamuthu*² has been explained by *Morgan, C. J.* and *Holloway, J.*, in their judgment in that case. The following extracts from the judgments in the two cases are very instructive and may with advantage be quoted here:—

[SCOTLAND, C. J.—“I take it to be clearly established that there must be not only the same property or subject of demand in dispute, either wholly or in part, between the same parties or their privies; but it must also appear that the identical question of right or title had before been *in judicio* * * * * . I take it to be also clear, as a general rule, both on principle and authority, that when a question of right or title has been adjudicated upon in a suit the bar of the judgment cannot be avoided by suing on a new form of

1. 3 M. H. C. R., p. 320.

2. 7 M. H. C. R., 160.

claim or on a ground of relief which might have been, but was not, raised or determined in the former suit, if such claim or ground arises out of and depends upon the same right or title as that which was directly in question in the former suit * * * * . A decree in a suit by a person claiming as heir or coparcener could be no bar to a second suit brought to try his right as donee or devisee of the same property, for the question of right would be different unless the latter right appeared to have been in question in the first suit as in the recent case of *Udaiya Tevar v. Katama Nachiar*¹, (affirmed on appeal to the Privy Council). But a decree in a suit for partition of family property would, in the absence of special circumstances, be, I think, a bar to a second suit for relief on the grounds not before raised, that the co-sharer or one of the co-sharers was illegitimate or had been removed out of the family by adoption or that part of the property was the self-acquisition of the plaintiff, because it would be a second time litigating the question of co-parcenary right which was the immediate object-matter of the first suit." (pp. 322-324) * * * * *

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[HOLLOWAY, J.—The whole case of the parties as to the matter of litigation must be brought forward. Taking the words 'matter of litigation' to mean 'question of right', which is the only proper sense in questions of *res judicata* there is no doubt of the perfect correctness of this opinion and the Vice-Chancellor expressly says that the items of account brought forward by the bill were matters of which an account might have been taken in the suit. The matter of the litigation was—'What sum is due on the transactions between the parties'—and the judgment of the Court on that question was of course *res judicata* both as to items brought forward and items not brought forward. It was simply *Eastmore v. Lawes* in equity and the meaning of the rule is not that a decree will bar a man as to matters never raised, if they are matters relating to the external object of the litigation but as to all matters which were relevant and examinable upon the question of right at issue between the parties. In *Hunter v. Stewart*², Lord Westbury very distinctly confines to the questions of right raised, the operation of *res judicata*; * * * and it (the decision) is also a distinct repelling by the highest English authority of any such rule as has

1. 2 M. H. C. R., 181.

2. VIII Jur. 317.

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been supposed, that, if any object-matter is brought into question, all possible claims thereto are necessarily offered for decision and that a man is equally barred from any future suit whether he has submitted a particular kind of claim or not"¹.

"The ground of denying the bar by *res judicata* is that he there put his right of inheritance on the ground of sonship by the Pattamastri, and that he puts it now upon the ground that he is the eldest son of his father. It appears that this fact was before the Civil Court, which says that the fact is admittedly indifferent and not capable of conferring the status claimed. To allow this ground to be set up now, would therefore be to do what it was sought to do in the Sivaganga case—set up a ground of claim, which the litigant had in the previous case expressly withdrawn by his admission from the cognizance of the Court. * * * * The better opinion probably is that he would be barred whether this ground of being heir was brought forward or not. The '*causa*' in the first suit was "being heir" and Paulus does not say that a new suit for the same object-matter may be brought because a new basis in fact of the same '*caussa*' is adduced, but where there is a different '*caussa*'. The present case seems to fall within his words '*mutatam actionem opinio petitoris non facit*'"².]

In the original Code of Civil Procedure (Act VIII of 1859) the law of *res judicata* was contained in Ss. 2 and 7, but they were far from being exhaustive. S. 2 of Act VIII of 1859 was in terms for less comprehensive than the present Code. It simply provided that no Court should take cognizance of any suit brought on a cause of action which (cause of action) had been heard and determined by a Court of competent jurisdiction in a former suit between the same parties. Notwithstanding that the operation of S. 2 was in terms restricted to 'cause of action' their Lordships of the Privy Council held in *Krishna Behari Roy v. Brojeswari*³ that "the expression 'cause of action' cannot be taken in its most restricted and literal sense," but that, however that may be, "by the general law, wherever a material issue has been tried and determined between the same parties in a proper suit and in a competent Court, * * * it cannot be again tried in another suit between them."

1. 3 M. H. C. R. at p. 332.

2. 7 M. H. C. R., 165-166.

3. L. R. 2, I. A. 283, at p. 285; 1 C. 144.

The subject of *res judicata* is dealt with in Ss. 13 and 43 of the present Code, and the expression 'cause of action' has been omitted in S. 13, by substituting in its place the expression 'matter directly and substantially in issue'—an expression which will include not only the cause of action on which the suit is based [*vide* 50 (d) Civil Procedure Code], but also all matters which are, or ought to be, put in issue for the determination of the cause of action.

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S. 43, which corresponds to S. 7 of the former Code, is also more comprehensive than the latter and provides that a person entitled to more remedies than one in respect of the same cause of action should combine all his remedies in the first suit, unless he obtains the leave of the Court to reserve some of his remedies for a subsequent suit.

Though the subject of *res judicata* is dealt with more comprehensively in the new Code than in the old one, yet Ss. 13 and 43 of the present Code are not exhaustive of the law of *res judicata*. That law has been the same under both the old and the new Codes—as definitively laid down by the Privy Council in *Kameswara Prasad v. Rajkumari*¹—and it is substantially the same as the English law. The decisions passed while the old Code was in force are therefore not the less applicable to cases arising under the present law; nor is there any force in the argument urged by the respondent's pleader that the absence of the expression 'cause of action' in S. 13 denotes a deliberate change introduced by the Legislature, requiring every plaintiff to exhaust in one suit all the causes of action which he may have at the date of the suit in respect of the property or the relief claimed by him and of which he was then aware.

The question was first considered, with reference to the new Code, by a Division Bench of this Court (*Innes and Muthusami Aiyar, JJ.*) in *Thyila Kandi Ummallia v. Thyila Kandi Cheria Kunhamed*², and it was there held, dissenting from two decisions of the Calcutta High Court, *Deenabundho Chowdri v. Kristomonu Dossee*³, *Bheeko Lall v. Bhuggoo Lall*⁴, that there was no difference between the old Code and the new Code and that the dismissal of a former suit which was based on a lease which was not proved was no bar to a subsequent suit brought for the recovery of possession of

1. I. L. R., 20 C. 79 at p. 86.

2. I. L. R., 4 M. 308.

3. I. L. R., 2 C. 152.

4. I. L. R., 3 C. 23.

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the same lands on the ground of the plaintiff's title as owner. The same question was again considered in *Alluri v. Kunjusha*¹ in which it was held by *Muthusami Aiyar* and *Hutchins, JJ.* that "Explanation II to S. 13 of the Civil Procedure Code of 1877 refers to the title litigated in the former suit as distinguished from the relief claimed. Where several independent grounds of action are available, a party is not bound to unite them all in one suit, though he is bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of action." We fully concur in this exposition of Explanation II to S. 13. In that case the former suit had been brought by the Karnavan of a tarwad to resume, from a junior branch, certain lands, which, it was alleged, had been under a special agreement allotted for its maintenance. That suit having been dismissed on the ground that the alleged agreement was not proved, it was held that a subsequent suit brought by the same Karnavan to obtain possession of the same property for purposes of management on behalf of the Tarwad from a junior branch which was in *de facto* possession of the same, was not barred by the former suit.

A question similar to that arising in the present case was considered in *Kandunni v. Kattiamma*² and it was there held that a former suit brought by the plaintiff against the defendant on a demise of 1856, which he alleged (but did not prove) was a renewal of a prior demise of 1835, was no bar to a subsequent suit brought to recover the same land on the demise of 1835 and on title³.

We have noticed at length the above decisions of the Privy Council and of this Court, as it was strenuously contended by the learned pleader for the respondents that they should all be regarded as virtually overruled by a comparatively recent decision of the Privy Council in *Kameswara Prasad's case*⁴, and that the later decisions of this High Court in *Arunachelam Chetty v. Meyyappa Chetty*⁵ and *Rangasami v. Krishna*⁶ are in conflict with the earlier decisions above referred to; and he also relied upon a recent decision of the Bombay High Court in *Gudappa v. Thirkappa*⁷.

1. I. L. R., 7 M. 264.

2. I. L. R., 9 M. 251.

3. See also I. L. R., 15 M., p. 336.

4. I. L. R., 20 C. 79.

5. I. L. R., 21 M. 91.

6. I. L. R. 22 M. 259.

7. I. L. R., 25 B. 189.

The decision of the Privy Council in 1892 in *Kameswar Prasad v. Rajkumari*¹ has been misapprehended and misapplied in certain cases. A careful perusal, however, of the judgment of the Judicial Committee in that case, clearly shows that that decision is not in conflict with the earlier rulings of the same tribunal in *Rajah of Pittapur v. Surya Rao*² and *Aminat Bibi v. Imdad Hussain*³ already referred to, which rulings have been re-affirmed in *Mahomed Raisat Ali v. Mussumat Hasin Banu*⁴ the judgment in which was given in July 1893, nearly a year later than that in *Kameswar Prasad's* case. The ruling in *Kameswar Prasad's* case is, no doubt, liable to be misunderstood if one does not bear in mind the facts of the case which are set forth in the judgment itself and which briefly are as follow:—A Hindu widow in possession of her husband's estate raised a loan of Rs. 61,000, and executed, on the 1st March 1872, a bond in favour of the creditor hypothecating a portion of her husband's estate as security for the debt. Shortly afterwards, on the 31st August 1872, an agreement was entered into between her and Run Bahadur, the presumptive reversionary heir of her husband, whereby she surrendered to him her interest in her husband's estate on condition that he (Run Bahadur) was to pay her an allowance of Rs. 24,000 for her maintenance and also pay off her liabilities. In 1876 the creditor brought a suit upon the hypothecation bond against the widow and Run Bahadur whom he joined as defendant in the suit on the ground that "the Rani had, under the agreement of 1872, given over to him the whole of the properties including what was mortgaged under the bonds"; but in that suit no relief was claimed against Run Bahadur personally. The final decree in that suit held the mortgage not to be binding upon the estate, but held the Rani personally liable for the amount due under the bond. After the death of the Rani the creditor instituted a suit in 1887 against Run Bahadur "to have him declared liable under the agreement of the 31st August 1872 to satisfy the decree obtained against the Rani under the bond". Upon these facts their Lordships of the Privy Council, after holding that the suit was barred by the 6 years' rule of limitation further held that the principle of *res judicata* was also fatal to the suit. Their Lordships advert-
ing to Explanation II to S. 13 held that the money having become

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1. I. L. R., 20 C. 79.

3. L. R., 15 I. A. 106; I. L. R. 15 C. 800.

2. L. R., 12 I. A. 116; I. L. R. 8 M. 520. 4. L. R., 20 I. A. 155; I. L. R. 21 C. 157.

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payable in September 1875, the date named in the bond, the creditor might and ought to have claimed relief personally against Run Bahadur in the former suit and that, having omitted to do so, he was barred from maintaining the subsequent suit. It is expressly stated in the judgment that he was joined as a defendant in the former suit by reason of the agreement of 1872, and the later suit was also instituted against him in consequence of the stipulation in the same agreement which he had entered into with the Rani, undertaking to pay her debts. It will thus be seen that the claim made in the former suit to enforce the mortgage against Run Bahadur and the claim made in the later suit for the recovery of the mortgage debt personally from Run Bahadur were whether rightly or wrongly based upon one and the same transaction, viz., the agreement of the 31st August 1872 entered into between him and the widow. The two suits were, therefore, founded upon the same cause of action, and the claims made in both the suits, so far as Run Bahadur was concerned, arose from that cause of action. It is immaterial to consider whether it would not have been possible to have shaped the former suit, against the widow and Run Bahadur (as the then presumptive reversionary heir) quite independently of, and without any reference to, the agreement of 1872. But, as a matter of fact, the suit was brought against him by reason of the transfer made to him under the agreement of 1872; and it was, therefore, held that it was clearly competent for the creditor to have alleged in that suit itself the personal liability arising under the same agreement, that he ought to have done so and could not be permitted to bring a subsequent suit to enforce such liability. If the attention of the Committee had been drawn to the latter portion of S. 43 of the Civil Procedure Code which requires (subject to the exception therein referred to) the joinder, in one suit, of plurality of remedies which a creditor may have in respect of the same cause of action, it is not improbable that the decision might have been based on S. 43 rather than on Explanation II to S. 13, but whichever of the two may be the more appropriate provision the result would be the same. It would also seem from the judgment in this case that even if a ground of attack be relevant and pertinent to the cause of action on which the suit is brought, the matter involved in such a ground will not necessarily be within the purview of Explanation II to S. 13, if it be so dissimilar to the

other grounds of attack that its union with them might lead to confusion. The next case relied on on behalf of the respondents is *Arunachellam Chetti v. Meyyappa Chetti*¹. No doubt there are certain general observations in the judgment in that case, which lend some support to the arguments advanced by the respondent's pleader on S. 42, and the absence of the expression 'cause of action' in S. 13; but with all deference, we are, for the reasons already stated, unable to concur in them, and after a careful perusal of the judgment we are satisfied that the ground of decision is that the cause of action on which the former suit was based was clearly identical with that in the subsequent suit and that the respective grounds advanced in support of the two suits were only "different means invoked for making out what is manifestly a single and indivisible infringement of the self-same right."

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We may here refer to the decision of the Judicial Committee in *Woomatura Debia v. Unnopoorina Dosse*² which is noticed in the above case and on which the decision is chiefly based. That decision of the Privy Council was passed in 1872 and it gives a clue to the true meaning of Explanation II to S. 13, Civil Procedure Code and shows that that explanation is only a compendious statement of the law as it has all along been understood, whatever difficulty there may exist in the application of it to particular cases, in determining the exact scope of the pleadings in the two suits and the question as to whether the two suits are, either in whole or in part, based upon the same cause of action. In that case it was held that the cause of action in both the suits was the dispossession of the plaintiff by the fixing of the boundary complained of and other proceedings under a special Act, the result of which proceeding was to affirm the possession of the defendants and to leave the plaintiff to her remedy by civil suit. In the first suit the plaintiff sought to establish her title by admitting that the land sued for was not included within the limits of her taluq or estate as originally settled and defined, but that she by gradual squatting or encroachment enlarged the boundary of the taluq. Having failed in that suit, she brought a second suit in which she sought to establish her title by contending that "the boundary between my estate and that of the defendant was improperly drawn so as to include in the defendant's holding that which of right should have been within my originally settled taluq and as I now claim in that

1. I. L. R., 21 M. 91; cf. I. L. R., 15 M. 336.

2. 11 B. L. R. 158.

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way that which I might have claimed in the former suit, I am not precluded from bringing this second suit." It is therefore clear that both the suits were based upon the same cause of action, viz., the plaintiff's title as owner, the only difference between the two being that in the former she sought to establish her ownership apparently by the operation of the law of limitation and in the latter suit by alleging that it was part of her original estate. This is only an authority for the position that if one is dispossessed of land and he brings a suit to recover possession on the strength of his title, he must establish this title in that very suit by urging and proving all that would go to establish his title and cannot reserve one or more of such grounds for a future suit; and this is what is laid down in Explanation II to S. 13, Civil Procedure Code. But neither that case nor the decision of the Privy Council in *Kameswar's case*¹, nor Explanation II to S. 13, can be relied on as lending any support to the proposition that a plaintiff who seeks to redeem a specific mortgage or to eject on a specific lease and fails in such suit, because the mortgage or the lease is not proved, is thereby precluded from seeking to redeem the same property or a portion thereof from another specific mortgage or to eject on the strength of his title the person in possession. Every transaction of lease imposes on the lessee the obligation of delivering to the landlord possession of the property at the expiration of the lease, and every transaction of mortgage imposes upon the mortgagee the obligation of re-transferring, after the expiration of the term of mortgage, the property free from all incumbrances created by him (or those claiming under him or under whom he claims) and, if necessary, delivering possession of the same to the mortgagor on discharge of the mortgage debt by payment or otherwise; and such obligation on the part of the lessee or mortgagee (as the case may be) arises from the transaction of lease or mortgage which in respect of such obligation operates as an executory contract. The cause of action, therefore, in a suit based on a lease or mortgage arises *ex contractu* and is based upon a contract. Such a suit, therefore, can be no bar to a subsequent suit, based upon plaintiff's title, against the same defendant as a trespasser, and it is difficult to see on what principle a suit based on an alleged specific contract, which is found against, can bar a subsequent suit on another and a distinct contract which is established. If the transaction of mortgage on which the subsequent suit is based is really the same as the transaction on which the former

1. I. L. R., 20 C. 79.

suit was based, which (latter) failed because the document by which the mortgage was sought to be established was fabricated, that will, of course, be a bar to the subsequent suit though the plaintiff seeks in it to establish the mortgage by producing the genuine mortgage-deed, or by proving that the mortgage was effected orally. The real test, therefore, is whether the cause of action or transaction on which the two suits are based, is the same, and not whether the transaction is sought to be established in different modes or by different means. It is clear that in the present case the alleged mortgage of 1856—which, it must be taken, was not true—on which the former suit was brought was, if it had been true, a transaction essentially and in every way different from the mortgage of 1853 on which the present suit is brought. The mortgage of 1856 was of about 50 cawnies of land for Rs. 250 only; the mortgage of 1853, though only of 14 out of the said 50 cawnies, was for Rs. 500, and apparently the term of the two usufructuary mortgages was different. The mere fact that the present suit is based on the jural relation of mortgagor and mortgagee between the plaintiff and the defendants—which was also the jural relation on which the former suit was based, in respect of the lands comprised in the present suit, in addition to other lands—does not show that both the suits are based upon the same cause of action or transaction. The relation of mortgagor and mortgagee is created by act of parties and if such acts are distinct, the relationship will be created by different transactions, each of which will constitute a separate cause of action—though, of course, if the same property be in truth and fact subject to different mortgages in favour of the same defendant, the plaintiff (mortgagor) cannot, from the very nature of the right of redemption, seek redemption, without redeeming all the mortgages and the defendant (mortgagee) ought, under Explanation II to S 13, Civil Procedure Code, to insist upon all the mortgages being redeemed, if the suit is brought for the redemption of only one or some of the mortgages. See *Sri Gopal v. Pirthi Singh*¹.

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The next case relied upon on behalf of the respondents, is the decision of this Court in *Rangasami Pillai v. Krishna Pillai*². This is probably the only case which lends support to the respondent's plea of *res judicata* founded upon S. 43. In that case the

1. L. R. 29 I. A. 118; I. L. R., 24 A. 429.

2. I. L. R., 22 M. 259.

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plaintiff's former suit to redeem a kanom of Rs. 25 (dated 1859) was dismissed on the ground that he failed to establish the same. In the documents filed in that suit there were certain admissions that the defendants held as kanomdars under the plaintiff. The subsequent suit was brought for the redemption of the same property and the suit was based upon the admissions (of mortgage) contained in the documents above referred to. In second appeal it was held that the second suit was rightly dismissed as the plaintiff was barred from bringing it by S. 43, Civil Procedure Code, "as it must be taken that he abandoned or relinquished his claim on the real cause of action when he brought it on a false one. That there was only one cause of action, viz., the right to redeem, is clear, and the plaintiff at the time of bringing his first suit was aware of the extent of the admissions made by the defendants, as they were contained in the documents put in by him (plaintiff) and he could or should have sued in the alternative instead of confining his rights to the specific mortgage which he failed to prove".

The *ratio decidendi* of the decision seems to be that if a plaintiff sues for certain property on a false claim or cause of action, when in reality he has, in fact and law, a true claim and cause of action for the same property, of which he was aware, he must be taken in law to have abandoned or relinquished his true claim and cause of action. Section 43 in terms deals only with claims arising from one and the same cause of action and it only provides against the splitting of a cause of action and there is nothing in it to warrant the inference that all causes of action ought to be included, in the alternative or otherwise, in one and the same suit. If, as held in the above case, there is a statutory waiver of the true cause of action when a suit is brought upon a false cause of action, it can make no difference whether the cause of action is false in the sense that the facts alleged as constituting the cause of action are false, or it is false in the sense that the facts alleged and proved do not in law constitute a cause of action entitling the plaintiff to the relief sought. It does not appear from the report of the case that any of the previous decisions of this Court or of the decisions of the Privy Council, already referred to, were cited to or considered by the Court. The decision is directly opposed to the decision of the Judicial Committee in *Amanat v. Imdad*¹ in which notwithstanding that the two previous suits were brought for the

1. L. R. 15 L. A. 106; I. L. R., 15 C. 800.

recovery of the same property as was again sought to be recovered in the third suit and notwithstanding that the cause of action on which the second suit, at any rate, was based was found to be false, it was held that there was no bar to the subsequent suit which was based on a different cause of action, and it is also opposed to the later decisions of this Court in *Zamorin v. Narayanan*¹ and *Kutti v. Chindan*² and the Full Bench decision in *Kaveri v. Sastri Ramiyer*³ though it has not been referred to and expressly overruled in any of them. In the first two of these it was held that a previous suit based on a lease which was not proved was no bar to a subsequent suit based on title. In the Full Bench case the cause of action alleged in the former suit was that the plaintiff was entitled to the property on the death of the widow, who had not joined the husband in making the adoption. The cause of action alleged in the subsequent suit was that the plaintiff was entitled to the property on the death of the adopted son. So far as s. 43 was pleaded as a bar to the suit, the plea was overruled on the ground that the claim in the subsequent suit was one arising from a cause of action quite different from and inconsistent with, the cause of action on which the former suit was brought and it could not possibly have been included in that suit as a part of the claim arising from the cause of action on which that suit was in fact brought (see p. 108).

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The last decision relied upon on behalf of the respondent is *Guddappa v. Tirkappa*⁴. With all respect to the learned Judges who took part in that case we are unable to follow that decision. It proceeds mainly on the footing that Explanation II to S. 13 of the present Code has introduced a radical change in the law of *res judicata*, and it, therefore, discards the various decisions which have been passed when the old Code was in force and attaches no weight to the several decisions passed under the new Code on the ground that Explanation II to S. 13, which is not specifically referred to therein, has been overlooked in them. So far as the decision of the Privy Council in *Kameswar Prasad's*⁵ case and the remarks of Lord Westbury in *Raja Muthuvijaya v. Katama Nachiar*⁶ are relied upon by the learned Judges in support of their conclusion, the decision seems to proceed on a misapprehension of the rulings of the Privy Council in the said

1. I. L. R., 22 M. 323.

3. I. L. R., 26 M. 104.

5. I. L. R., 20 C. 79.

2. I. L. R., 23 M. 629.

4. I. L. R., 25 B. 189.

6. 11 M. I. A. 73.

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Aiyar.

two cases. In the Bombay case the plaintiff brought his former suit, when he was in possession of the property, to obtain a declaration of his title thereto, by right of survivorship as the surviving co-parcener with one Ningappa who died leaving a widow under whom the defendant claimed. This suit was dismissed on the ground that the plaintiff and Ningappa were divided and that, therefore, the property devolved upon the widow by inheritance. The plaintiff was subsequently dispossessed and the second suit was brought to recover possession of the property on the ground that the plaintiff was entitled to the same as reversionary heir on the death of Ningappa's widow and that the alienation made by her in favour of her brother was not binding upon him. There can hardly be any doubt that, if the former suit had been brought on the alleged right of survivorship during the lifetime of the widow, it would not have operated as a bar to the subsequent suit brought after the death of the widow. Can it make any difference that the former suit was, as appears from the report of the case, also brought after the death of the widow? The cause of action which accrues to one by right of survivorship in an undivided family is quite distinct from the cause of action which would accrue to him only as reversionary heir on the death of the deceased's widow. In the former case, the right comes into existence immediately on the death of the undivided member and that in respect of property which was jointly owned by both. In the latter case his right is only as heir to the exclusive and separate property of a divided kinsman, who has died intestate, and if he died leaving a widow, his reversionary right is only a contingent one which would vest only if he survived the widow. The two rights, therefore, spring from totally different causes of action, and unless the rule of law were that a plaintiff is bound to unite in the same suit his causes of action in the alternative, as he might have done in the Bombay case, it is impossible to hold that Explanation II to S. 13 operates as a bar to the subsequent suit.

The second appeal is, therefore, allowed, and reversing the decree appealed against, the case is remanded to the Lower Appellate Court for disposal on the merits. The costs of this second appeal will be costs in the case.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr Justice Benson, Mr. Justice Bhashyam Aiyangar
and Mr. Justice Russell.

Chidambara Patter ... Appellant* (3rd Defendant).
v.

Ramasami Patter and others. Respondents (*Plaintiff, 1 and 2
Defendants and L. R. of 2nd
Defendant*).

Civil Procedure Code, Ss. 279, 280, 281, 283, 301 and 355—“Possession” and “Possessed”—Debt other than negotiable instrument—Attachment of—Claim by third party—Order on claim—Limitation Act, Sch. II, Art. 11.

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Patter.

The term “possession” is one which is used in widely different senses in dealing with different subjects and refers sometimes to tangible or physical possession and sometimes to constructive or legal possession.

The word “possessed” in S. 279 and the word “possession” in Ss. 280 and 281 are not restricted to merely tangible or physical possession but include constructive possession or possession in law of debts and other intangible property.

A debt may be attached under Ss. 266 and 268, and a claim may be preferred against the attachment and investigated under S. 278, and an order passed in such claim under S. 283, C. P. C., will be subject to the operation of S. 283, C. P. C., and Art. 11 of Sch. II of Act XV of 1877 (Limitation Act).

*Basavayya v. Syed Abbas Saheb*¹ overruled.

The word “possess” in S. 355, C. P. C., is applicable not only to tangible property but also to debts and other intangible property.

Appeal from the order of the Subordinate Judge's Court of Palghat, dated 16th October 1902, in A. S. No. 482 of 1902, preferred against the decree of the District Munsif of Alatur in O. S. No. 556 of 1901.

This appeal coming on for hearing on Thursday, the twenty-third day of April, one thousand nine hundred and three, when the Court (Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar) made the following

ORDER OF REFERENCE TO A FULL BENCH †:—Before disposing of this appeal we wish to refer the following question for the opinion of the Full Bench, viz. :—

Whether when a debt not secured by a negotiable instrument is attached under S. 268, Civil Procedure Code, a claim can be preferred by a third party, and investigated under S. 278, Civil Procedure Code, and, if so, whether an order disallowing the claim is subject to the operation of S. 283, Civil Procedure Code, and Article 11 of Schedule 2, Limitation Act.

* A. A. O. No. 170 of 1902.

1. I. L. R., 24 M. 20.

† 23rd April 1903.

Chidambara
Patter
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Ramasami
Patter.

The question must be taken to have been decided in the negative in the case of *Basavayya v. Syed Abbas Saheb* but we are doubtful as to the correctness of that decision, and the question is of such wide importance that we think it desirable that it should be settled by a Full Bench.

P. R. Sundara Aiyar for appellant.

K. R. Subramania Sastri for respondent.

OPINION* :—Our answer to the questions put to us is in the affirmative. In our opinion Ss. 278 to 281 of the Civil Procedure Code are not restricted to properties under attachment which are capable of tangible or physical possession.

The term “possession” is, no doubt, one which is used in widely different senses in dealing with different subjects, and refers sometimes to tangible or physical possession and sometimes to constructive possession, or possession in law. In Webster's Dictionary the legal meaning of “possession” includes “the having or holding of property in one's power or command.” See also Anderson's Dictionary of Law, page 790.

In our opinion it would be unreasonable to restrict the meaning of the word “possessed” in S. 279, and of the word “possession” in Ss. 280 and 281 to merely tangible or physical possession. Such restricted meaning would, we think, unduly narrow the operation of S. 278 which relates to claims preferred to and objections made to the attachment of, “any property attached.” S. 266 specifies a debt as one species of property which is liable to attachment, and S. 268 prescribes the mode in which a debt is to be attached. S. 301, which vests a debt sold in execution in the purchaser, refers to such transfer of the debt as “delivery” of the debt. No reason can be suggested for excluding from the beneficial operation of the claim sections of the Code debts and other species of intangible property. We may also refer to S. 355 of the Code in which the word “possess” is clearly used as applicable not only to tangible property but also to debts and other intangible property.

We are therefore of opinion that the words “possess” and “possession” in the claim sections of the Code include constructive possession, or possession in law, of debts and other intangible property, and that the decision to the contrary effect in *Basavayya v. Syed Abbas Saheb*¹ is erroneous.

* 16th October 1903.

1. I. L. R., 24 M. 20.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH).

Present:—Mr. Justice Benson, Mr. Justice Bhashyam Aiyangar,
and Mr. Justice Russell.

Bashyakarlu Naidu ... Petitioner* in all cases (*Plaintiff*).

v.

Gundapaneni Subbanna ... Respondent in C. R. P. No. 492
of 1902 (*Defendant*).

Rent Recovery Act, ss. 7, 9, 10 and 72—Landlord and Tenant—Suit for enforcement of patta—Judgment modifying patta—Necessity of fresh tender—Suit for rent—Maintainability. Bashyakarlu Naidu v. Subbanna.

Where the pattach originally tendered was such as the tenant was bound to accept and judgment was passed in the Summary Court directing the execution of a muchilika a suit for rent would be maintainable without the necessity of a fresh tender after the judgment.

Where the pattach is amended by the judgment in the summary suit, the landlord may maintain a suit for rent if before the expiry of the fasli to which the pattach relates the landlord has tendered a pattach as amended.

Where no such tender is made or no such tender can be made by reason of the expiry of the fasli before the judgment amending the pattach is passed a suit for rent is only maintainable either when the tenant has executed a muchilika in accordance with the judgment modifying the pattach in the summary suit or if the tenant has refused to execute such a muchilika when a certified copy of the judgment is declared by S. 72 of the Rent Recovery Act to have the same force and effect as a muchilika executed by the tenant himself.

There is no refusal to execute a muchilika by the tenant within the meaning of S. 72 of the Rent Recovery Act unless before the suit for rent is brought by the landlord the latter makes a requisition or demand on the tenant calling upon him to execute a muchilika in accordance with the judgment then in force.

*Court of Wards v. Dharmalinga*¹ overruled.

*Shanmuga Mudaly v. Palnati Kuppu Chetty*² followed.

Petitions under Section 25 of IX of 1887 praying the High Court to revise the decrees of the District Munsif's Court of Elloré in Small Cause Suits Nos. 195, 196 and 967 of 1902.

The Court (the Hon'ble Mr. Justice Benson) made the following

ORDER OF REFERENCE TO A FULL BENCH †:—The decision of the District Munsif is opposed to the decision in the case of *Court of Wards v. Dharmalinga*,² and this decision has not been overruled generally by the Full Bench decision, *Shanmuga Mudaly v. Palnati Kuppu Chetty*¹, but only as regards cases in which it is sought to eject the tenant. The reasoning in the Full Bench Case, however, seems to me to apply to cases like the present, in which the suit is for rent, equally with cases in which ejectment is sued for.

M. R. Ramakrishna Aiyar for *S. Gopalasami Aiyangar* for the petitioners.

N. Rajagopalachariar for respondent in C. R. P. 492 of 1902.

* C. R. P. Nos. 492 to 494 of 1902.

† 13th October 1903.

1. I. L. R., 9 M. 2.

2. I. L. R., 25 M. 613.

Bashyakarl
Naidu
v.
Subbanna.

V. Ramesam for respondents in C. R. P. 493 and 494 of 1902.

OPINION *:—If the pattah which had been originally tendered before the Summary Suit under S. 9 of the Rent Recovery Act was one that the tenant was bound to accept, the landlord might by virtue of S. 7 sue for the recovery of rent on the strength of such tender alone, without any fresh tender of a pattah, or the execution of a muchilika after judgment.

But if the pattah originally tendered was not such as the tenant was bound to accept, and if it had been modified by the judgment in the summary suit, and if before the expiry of the fusli to which the pattah relates, the landlord tendered the pattah as amended, he could also maintain a suit for rent under S. 7, relying on such tender. If, however, no such tender was made (and even in cases where it could not have been made by reason of the expiry of the fusli before the judgment was passed), the landlord could sue for rent only if the tenant had executed a muchilika, which he was directed to execute by the judgment, or if he had refused to execute the same. In the latter case S. 72 provides that certified copy of the judgment of the Collector shall have the same force and effect as a muchilika executed by the tenant himself; but we are clearly of opinion that he cannot be said to have refused to execute the muchilika unless before suing for rent the landlord made a requisition or demand on the tenant calling upon him to execute a muchilika in accordance with the judgment then in force. We dissent from the contrary view taken in *Court of Wards v. Darmalinga*¹. The view we have taken is, we think, in accordance with that taken in the recent Full Bench decision of this Court in *Shanmuga Mudaly v. Palnati Kuppu Chetty*² although the proceedings in that case related to the ejectment of the tenant in execution of a decree under S. 10.

In C. R. P. 494 there is no allegation of any such demand as is required by law, and there is therefore no ground for revision in that case. It is dismissed with costs.

In C. R. P. Nos. 492 and 493 however the plaint distinctly alleges such demand and refusal. We therefore set aside the decrees of the District Munsif in these two cases and remand the suits for disposal according to law. Costs in this Court will be costs in the cause.

* 16th October 1903.

1. I. L. R., 8 M. 2.

2. I. L. R., 25 M. 613.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies.

Saminatha Pandaram

...Petitioner* (*Defendant*).

v.

Kuppu Udayan

...Respondent (*Plaintiff*).

Small cause nature—Suit for an annuity—Allowance not in satisfaction of any right of maintenance.

Saminatha
Pandaram

v.

Kuppu
Udayan.

Where a person allows maintenance to his sister not by way of satisfaction of her right of maintenance but the allowance is to be paid out of the income of her own property which she transfers to her brother, the same is an annuity and a suit for the recovery thereof is maintainable by a Court of Small Causes.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Subordinate Judge's Court of Kumbakonam in Small Cause Suit No. 2180 of 1901.

P. S. Sivaswami Aiyar for petitioner.

V. Krishnaswami Aiyar and *K. Jagannadha Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—The suit is to enforce the payment by the defendant of a certain quantity of paddy, that the defendant is liable under Exhibit A to pay to his sister whose right the plaintiff has bought in court auction.

The first objection is that the allowance that the defendant had to pay to his sister was an allowance for her maintenance, and therefore this suit as being one relating to maintenance is not cognizable by a Court of Small Causes. The allowance, however, was not made to the defendant's sister by way of satisfaction of her right to maintenance, she had no such right. The allowance was to be paid out of the income of her own property which she was making over to the defendant. It was, therefore, in the nature of an annuity.

The petition is dismissed with costs.

[This judgment was subsequently confirmed in L. P. A. No. 46 of 1902 by Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar :—Ed.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Chief Justice*,
Mr. Justice Davies and Mr. Justice Benson.

Sappani Asari ... Appellant* (*Plaintiff*).

v.

The Collector of Coimbatore... Respondent (*2nd Defendant*).

Sappani Asari *Darkhast rules—Grant of house-site—Tahsildar's order granting lands for house-site—*
v. *Appeal from darkhast grant to Sub-Collector—Sub-Collector requesting orders of*
The *Collector—Copy of Collector's order transmitted to Tahsildar—No decision by Sub-*
Collector of *Collector—Collector's revisional powers—Matter not governed by Regulations—*
Coimbatore. *Madras Regulation II of 1803, S. 9.*

The grant of lands by Government for house-sites is not governed by any Regulation in force in 1803 or any Regulation subsequently enacted.

The Collector has no revisional powers under S. 9 of Regulation II of 1803 (*Madras*) over orders relating to grant of house-sites.

The subject of grant of lands by Government for house-sites is governed by executive orders of Government, which direct that the right of appeal from a Tahsildar's order with reference to the grant of a house-site shall be to the Sub-Divisional officer and not to the Collector, and that the order of the Sub-Divisional officer shall be final.

Where the Tahsildar ordered that a grant of lands should be made and there was an appeal from this order to the Sub-Collector, and the latter wrote to the Collector requesting favor of orders upon the matter, and the Collector passed an order revoking the grant which was communicated by the Sub-Collector to the Tahsildar:—

- Held* (1) That the Sub-Collector had exercised no discretion in the matter and made no order on the appeal.
- (2) That only the Sub-Collector could set aside the order of the Tahsildar in respect of the grant on an appeal preferred from the order of the Tahsildar.
- (3) That the matter not being dealt with by any Regulation, the Collector had no revisional powers, and his order could not, therefore, be regarded as an order made by the Collector in the legal exercise of his revisional powers.
- (4) The order of the Tahsildar not being legally set aside there was a valid grant.

Appeal under S. 15 of the Letters Patent from the decree of this court, dated the 25th April 1902 in S. A. No. 1221 of 1900, presented against the decree of the District Court, Coimbatore.

* L. P. A. No. 35 of 1902.

30th January 1903.

tore, in A. S. No. 225 of 1898 (O. S. No. 906 of 1897 on the file of Sappani Asari v. The District Munsif's Court of Erode).

The facts appear from the judgment reported in 12 M. L. J. R., p. 417, from which this appeal has been preferred.

P. R. Sundara Aiyar for appellant.

The Government Pleader (E. B. Powell) for respondent.

The Court delivered the following

JUDGMENT :—It is not necessary for us to consider the question of the validity of the first grant upon which the plaintiff relies, since we are clearly of opinion that under the second grant to the 1st defendant the plaintiff had, at the date of the institution of this suit, a good title to the site in question. The grant of the site was duly made by the Tahsildar. S. 9 of Regulation II of 1803 does not apply since the matter is not governed by any Regulation in force in 1803 or by any Regulation subsequently enacted. The matter is governed by executive orders of Government, which direct that the right of appeal from a Tahsildar's order with reference to the grant of a house-site shall be to the Sub-divisional officer (not to the Collector) and that the order of the Sub-divisional officer shall be final. At the time the 2nd grant was made by the Tahsildar an appeal lay from his decision to a Divisional officer. An appeal from the decision of the Tahsildar was brought to the Sub-Collector. Certain proceedings then took place which are recorded in Exhibit VII ;

“ Proceedings of the Collector of Coimbatore, dated 11th December 1895.

Read letter from the Sub-Collector, dated 20th November 1895, Reference on No. 1632, R. S. of 1895, requesting orders on the house-site darkhast appeal of Vadamalai Asari of Karungalpalaiyam.

Order Reference on C. No. 4688 of Rev.

It is clear that the grant of the land to Krishnasami Asari has been obtained fraudulently in order to evade the Collector's order declining to grant it to Veerappa Asari. Under the circumstances it should be cancelled, and the party now in possession of the house ordered to vacate it and remove the materials from the land within 3 months' time. It should be reported whether this order is obeyed. 2. The Tahsildar showed great want of judgment in failing to stop the building as requested by the appellant.

For Collector.

Seppani Azari
v.
The
Collector of
Coimbatore.

To

The Sub-Collector of Coimbatore with a file of records.

(Copy).

Communicated to the Tahsildar of Erode for information and guidance and submission of the report at the end of the period.

2. A similar neglect of orders should not take place.

3. The notice should be served at once and sent to this office for record.

(Initialled)———,

Ag. Sub-Collector.

10—12."

It seems to us impossible to regard these proceedings as a decision by the Sub-Collector on the question raised in the appeal to him. The only order in appeal is that of the Collector and that order was merely communicated by the Sub-Collector to the Tahsildar. The Sub-Collector exercised no discretion with reference to the question which came before him in appeal. In short he did not deal with the appeal and he made no order thereon. No authority has been referred to, and no argument has been addressed to us, to show that in matters not dealt with by the Regulations, the Collector has a revisional power similar to that given to him by the Regulations in matters dealt with therein; and that the Collector's order on the appeal to the Sub-Collector ought to be regarded as an order made by the Collector in the legal exercise of his revisional powers. It cannot therefore be said that the order of the Tahsildar granting the site has been legally set aside.

This being so we must hold that by virtue of the grant duly made by the Tahsildar, the plaintiff had a good title at the date of the institution of the suit.

The plaintiff is entitled to a decree declaring his title to the land in question. The decree of the District Court and that of this Court affirming that decree will be set aside. The decree of the District Munsif will be restored in so far as it declares the plaintiff's title and as to costs. The plaintiff's right to have the decree restored in so far as it relates to other reliefs claimed by him has not been pressed before us. The plaintiff is entitled to his costs in this Court and in the lower appellate court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Nagasamy Aiyar... ... Appellant* (*Plaintiff*).

v.

Perumal Aiyar and others... Respondents (*1 to 4 Defendants*).

Civil Procedure Code, S. 43—Suit based on specific lease dismissed—Subsequent suit on title—Different causes of action—Former suit no bar—Prayer for injunction to quit a house—Prayer for possession—Tenancy found—Suit on title not maintainable—Ejectment suit on the ground of termination of tenancy proper remedy.

Nagasamy
Aiyar
v.
Perumal
Aiyar.

A prayer for an injunction to the defendant to quit a house is really one for possession.

A suit to eject the defendant based on a specific lease for a term of years which being unregistered is inoperative is no bar to the institution of a fresh suit based on title. The causes of action in the two suits being different. S. 43, C. P. C., does not apply and is no bar to the second suit.

Where payment of rent is proved, a tenancy from month to month arises although a lease of the house becomes inoperative by non-registration.

Where there is a tenancy, a suit based upon title without stating how the tenancy has terminated is not maintainable.

Where the tenant has denied the landlord's title and the landlord claims that the tenancy has been forfeited by such denial, the landlord's remedy is by a suit for ejecting the tenant on the ground that the tenancy has determined and not by a suit on title as owner.

Second appeal from the decree of the District Court of Madura in A. S. No. 353 of 1901 presented against the decree of the Court of the District Munsif of Madura in O. S. No. 271 of 1900.

Plaintiff brought a suit in 1899 for arrears of rent due from defendants and for an injunction against the defendants to vacate the house. The claim was based on a rent deed executed by defendant in 1894. The defendants denied the tenancy and asserted title in themselves. The District Munsif dismissed the suit on the ground that the lease deed not being registered was inadmissible in evidence, and also held that the prayer for injunction (plaintiff being out of possession) could not be sustained and that the proper prayer was one for possession. The plaintiff thereupon brought the present suit basing his claim on his title for possession and for

* S. A. No. 1633 of 1901.

23rd March 1903.

Nagasamy
Aiyar
v.
Perumal
Aiyar.

damages. The District Munsif found that the defendants were paying rent to plaintiff and that, consequently, the plaintiff was in possession within 12 years prior to the suit and decreed plaintiff's claim. The District Judge on appeal reversed the Munsif's decree, holding the suit barred by S. 43, C. P. C. Hence this second appeal.

S. Srinivasa Aiyar for *V. Krishnaswami Aiyar* for appellant.

P. R. Sundara Aiyar for respondent.

The Court delivered the following

JUDGMENT :—S. 43 of the Civil Procedure Code is clearly inapplicable and is no bar to the suit. The former suit was based on a specific lease for a term of years, which being unregistered, was inoperative. The former suit, therefore, was rightly dismissed on that ground. The former suit was really one for possession not for an injunction. A prayer for an injunction to the defendant to leave a house, is really nothing more than a prayer for possession.

It was also found in that case that payment of rent was proved and that there was thus a tenancy from month to month which was not terminated.

The present suit is one for possession based upon title, and therefore on a cause of action different from that on which the former suit was based, S. 43 therefore cannot bar the present suit. The District Munsif in this case finds that the defendants occupy the house as plaintiff's tenants which is really in accord with the finding in the former case that the tenancy is one from month to month. The plaintiff bases the suit on title but does not aver how the tenancy has terminated. The District Munsif therefore instead of dismissing the suit on the ground that the defendant's tenancy has not been terminated, gave a decree for the plaintiff on the strength of his title. The appellant contends referring to the judgment in the former case that the defendants denied the plaintiff's title and thus forfeited the tenancy. If so, the plaintiff's remedy, if any, is by a suit for ejecting the tenant on the ground, that the tenancy has determined and not by a suit on title as owner. We therefore uphold the decree but on this ground only and dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Kadegan *alias* Swami Chetti ... Appellant* (1st Defendant).

v.

Periya Munusami and others ... Respondents (*Plaintiffs and 2nd Defendant*).

Hindu Law—Joint fami'y consisting of father, son and son's sons—Mortgage by son not binding on family—Decree obtained by mortgagee—Son's right, title, and interest sold in specific lands—Father making gift of moiety in lands sold to grandsons—Court sale—Partition—Ratification by father's gift—Rights of grandsons.

Kadegan
v.
Periya
Munusami.

Where a person purchases the right, title and interest of a member of a joint family in a specific portion of joint family property and the sale does not bind the other remaining members, the latter may affirm the sale in respect of the share of the member whose right, title and interest is sold in the specific land and will then become divided in respect of such portion of the family land. The purchaser in such a case need not be driven to enforce his purchase by bringing a suit for a general partition of the whole of the family property.

*Chinna Sanyasi v. Suriya*¹ referred to.

Where a joint family consisted of the 2nd defendant's father, the 2nd defendant and the plaintiffs the 2nd defendant's sons and in execution of a decree obtained on a mortgage-bond executed by the 2nd defendant and not binding on the family, the 1st defendant became the purchaser of the right, title and interest of the 2nd defendant in a specific portion of the joint family property and the interest of the sons in such property also passed by the sale and the 2nd defendant's father thereupon made a gift of the moiety of the specific property to his grandsons (the 2nd defendant's sons) who now brought a suit to recover such specific moiety :—

- Held* :—(1). That the gift by the 2nd defendant's father amounted in effect to a ratification of the court sale as effecting a partition of the property (to which the sale related) between himself and his son ;
- (2). That as the gift is by a member of a joint family of property with respect to which he is divided the same is valid and the fact that he is undivided with respect to other property does not affect its validity ;
- (3). That no decree for joint possession with the purchaser could be passed ;
- (4). That if the lands sued for under the gift represented a fair half of the lands to which the 1st defendant's sale related, a decree for recovery of the same should be given ; otherwise the court should allot to the plaintiffs such portion of the lands as would represent their half-share.

Second appeal from the decree of the District Court of Salem in A. S. No. 73 of 1900 confirming the decree of the Court of the District Munsif of Krishnagiri in O. S. No. 714 of 1898.

* S. A. No. 1087 of 1901.

1. I. L. R., 5 M. 196.

24th July 1903.

Kadegan
v.
Periya
Munisami.

V. Visvanatha Sastri for *K. Narayana Row* for appellant.
P. S. Sivaswami Aiyar for respondents.

The Court delivered the following

JUDGMENT*:—The joint family consisted of the 2nd defendant's father, the 2nd defendant, and the plaintiffs who are the sons of the 2nd defendant. In execution of a decree obtained on a mortgage bond executed by the 2nd defendant alone, which admittedly did not bind the family, the right, title and interest of the 2nd defendant in a specific portion of the family property, was sold and was purchased, by the 1st defendant who was the decree-holder, and it may be assumed that right, title and interest of the 2nd defendant's sons also.

On the principle of the decision reported in *Chinna Sanyasi v. Suriya*¹ it was open to the remaining co-parcener, viz., the father of the 2nd defendant, if he so chose to affirm the court sale in respect of the moiety of the specific land, and thus become divided in respect of such portion only of the family land, in which case the purchaser need not be driven to enforce his purchase by bringing a suit for a general partition of the whole of the family property.

In the present case, the 2nd defendant's father, by subsequently making a gift of his moiety in such portion has, in effect, ratified the court sale as effecting a partition of the property to which the sale related between himself and his son under whom the purchaser claims. In this view, the gift is really one made by a member of an undivided family who had become divided in respect of a portion of the family property, a moiety of which was the subject of the gift. The gift, moreover, was not of an undivided moiety but of a specific moiety, purporting to be equal in quality and extent to the remaining moiety.

The plaintiffs brought their suit to recover such specific moiety and applied to the District Munsif for an amendment of the plaint, so as to give them a fair moiety, if the claim to the specific moiety was not granted. The courts below acted irregularly in giving them a decree for joint possession with the 1st defendant as an equal co-sharer with themselves of the whole of the land

* 2nd February 1903.

1. I. L. R., 5 M. 196.

instead of giving them the sole possession of the specific half claimed, or of a fair half of the land.

Kadegan
v.
Periya
Munusami.

We must, therefore, ask the District Judge to allow the plaint to be amended as prayed for and to submit a finding on this issue *viz*:—Whether the specific lands claimed in the plaint are a fair half of the lands to which 1st defendant's sale relates, and, if not, what lands should be allotted to the plaintiffs as their half share.

Fresh evidence may be taken on both sides. The District Judge should submit his finding within two months from this date. Ten days will be allowed for filing objections.

This second appeal coming on for hearing after the return of the finding of the lower appellate court upon the issue referred by this court for trial, the court delivered the following final

JUDGMENT:—The finding is not objected to. Reversing the decrees of both the courts we direct that a fresh decree be drawn up in the terms stated by the District Judge at the end of para. 3 of his finding. Each party will bear his own costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Chief Justice*,
and Mr. Justice Moore.

Dorasami Pillai *alias* Akantachia Pillai and

others Appellants*
(*Plaintiffs*).

v.

Muthusami Mooppan and others ... Respondents
(*Defendants*).

Rent Recovery Act, Ss. 36 and 40—Civil Procedure Code, S. 28—Misjoinder—Landlord taking special procedure under Act for realization of rent—Onus on landlord to show requirements of Act have been complied with—Arrears of rent—Attachment by landlord of defaulter's interest in land—Sale, notice of—Interval of time between date of issue of notice and sale—Irregularity—Sale vitiated—Sale after 7 days from date of public notice immaterial—Parties in a suit to set aside sale.

Dorasami
Pillai
v.
Muthusami
Mooppan.

* S. A. No. 1352 of 1901.

6th August, 1903.

Dorasami
Pillai
v.
Muthusami
Mooppan.

It is for the landlord who seeks to avail himself of the special procedure by way of distress provided for by the Act to show that the requirements of the Act have been complied with.

*Maharajah of Burdwan v. Tarasundari Debi*¹, *Nathu Achalaiayyangar v. Parthasarathi Pillai*², *Mahomed Zamir v. Abdul Hakim*³, and *Hurro Doyal Roy Chowdhry v. Mahomed Gazi Chowdhry*⁴ followed.

Ss. 36 and 40 of the Rent Recovery Act should not be read together so as to import into S. 40 the effect of S. 36 as regards sales of moveable property.

Prima facie, a non-compliance with the requirements of the Act will vitiate a sale. An exception is introduced to this general rule by S. 36 which is expressly limited to the case of moveable property.

The reason for the exception is that damage sustained by irregularity in the sale of moveable property can in all cases be met by pecuniary compensation.

An irregularity in the sale under S. 40 of the defaulter's interest in the land will vitiate the sale. *Nathu Achalaiayyangar v. Parthasarathi Pillai*² followed.

S. 18 does not require that notice should be published 7 days before date of sale, but that in fixing the date of sale not less than 7 days must be allowed from the time of public notice.

Where a sale is notified to take place for a number of days, the first day is none the less "a day fixed for sale" within the meaning of S. 18, although as events may turn out no sale may in fact take place on that day.

Though a sale of every item of the property sold is a separate sale and different persons may have purchased at such sales a suit by the tenant to set aside the sales against the different purchasers is a suit in respect of the "same matter" and is not bad for misjoinder where the ground of relief is the alleged wrongful sale of the tenant's lands in respect of the same arrears and the proceeding in respect of which the various items are sold is one.

In a suit under S. 283, C. P. C., the cause of action is not the order under S. 283 but the alleged wrongful attachment is the cause of action and the different purchasers of the attached property may be properly joined as defendants in the same suit.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 989 of 1900 presented against the decree of the Court of the District Munsif of Tanjore in O. S. No. 568 of 1898.

P. S. Sivaswami Aiyar for appellants.

V. Krishnaswami Aiyar for respondents.

1. I. L. R., 9 C. 619 at p. 614.

3. I. L. R., 12 C. 67.

2. I. L. R., 3 M. 114.

4. I. L. R., 19 C. 699.

The Court delivered the following

JUDGMENT:—Two questions arise for determination in this appeal. First, was the sale of the lands in question *bad* for the reason that the requirements of S. 18 of the Act (VIII of 1865) with reference to the public notice were not complied with? Secondly, was the suit *bad* for misjoinder of parties and causes of action?

Dorasami
Pillai
v.
Muthusami
Mooppan.

As regards the first question S. 18 requires a notice to be fixed up specifying the property to be sold and the time and place fixed for its sale and provides that in fixing the day of sale not less than seven days must be allowed from the date of the notice. The time fixed for the sale was the 22nd, 23rd, 25th and 26th of April.

The notice was dated the 14th of April, but the District Munsif found, and there was evidence to support the finding, that it was not published till the 16th i. e., less than seven days before the first day fixed for sale. The District Judge was of opinion that the evidence did not establish that the notice was published less than seven days before the earliest of the four days fixed for the sale.

In thus placing the onus on the plaintiffs we are clearly of opinion that the learned Judge was wrong. It is for the landlord who seeks to avail himself of the special procedure by way of distress provided for by the Act, to show that the requirements of the Act have been complied with. See the judgment of the Privy Council in *Maharajah of Burdwan v. Tarasundari Debi*¹ and *Nattu Achalai Ayyangar and another v. Parthasaradhi Pillai*², *Mahomed Zamir v. Abdul Hakim and another*³, *Hurro Dayal Roy Chowdhry v. Mahomed Gazi Chowdhry and others*⁴. The learned Judge further held that even if the sale notice was published only six days before the sale this amounted merely to an irregularity which would not vitiate the sale. Here again, we think he was wrong. S. 40 provides that the sale of a defaulter's interest in land should be conducted under the rules laid down for the sale of moveable property distrained for arrears of rent and S. 36 provides that no irregularity in publishing or conducting a sale of moveable property under the Act shall vitiate the sale, but that any person who has sustained damage by reason of the irre-

1. I. L. R., 9 C. 619 at p. 624.

2. I. L. R., 3 M. 114.

3. I. L. R., 12 C. 6-7.

4. I. L. R. 19 C. 699.

Dorasami
Pillai
v.
Muthusami
Mooppan.

gularity may bring a summary suit before the Collector to recover compensation for the damage. It was argued that S. 36 and S. 40 must be read together and that the effect of S. 36 is imported into S. 40 so as to make the provisions of S. 36 with reference to sales of moveable property applicable to a sale of land distrained for arrears of rent. Such a construction cannot be adopted without doing violence to the express words of the section.

S. 36 introduces an exception to the general rule that *prima facie* non-compliance with the requirements of the Act will vitiate a sale. The exception is expressly limited to the case of moveable property; and it may be said there is good reason for this. Damage sustained by irregularity in the sale of moveable property could in all cases be met by pecuniary compensation. It is quite conceivable that damage sustained by irregularity in the sale of land could not.

It seems to us impossible to treat the enactment contained in S. 36 as one of the rules laid down for the sale of landed property referred to in S. 40. The *ratio decidendi* of *Nathu Achalai Ayyangar v. Parthasarathi Pillai*¹ appears to us to be applicable to the facts of the present case.

It was also contended that inasmuch as the sale did not in fact commence until the 23rd, a notice published on the 16th would be published seven days before the sale and the requirements of the section would be met. The short answer to this contention is that the section does not require that the notice should be published seven days before the sale takes place, but that in fixing the day of sale not less than seven days must be allowed. August 22nd was none the less the fixed day of sale, because as events turned out, no sale in fact took place on that day. In our judgment the sale was bad and must be set aside.

As regards the second question, the District Munsif was of opinion that the suit was bad for misjoinder. In the view taken by the Judge it was not necessary for the lower appellate court to decide the point. In our judgment the suit is not bad for misjoinder. The right to relief alleged to exist against the several defendants is in respect of the same matter (see S. 28 of the Code of Civil Procedure), viz., the alleged wrongful sale of the plaintiff's lands.

1. I. L. R. 3 M. 114.

In a sense of course the sale of every item of the property sold constituted a separate sale, but the "matter" was the same; the sale was a sale of distrained property under the same notification and in respect of the same arrears. The proceeding in which the various items were sold was one, and the ground upon which the validity of the sale was impugned is the same in each case. The same defect vitiates the whole proceeding and is the common ground of attack. The cause of action is the same as against all the defendants. In the case to which Mr. Krishnasamy Aiyer referred (*G. Burstall v. Beyfus*¹) the cause of action alleged against defendant A was distinct from the cause of action alleged against defendant B. Even if the words "in respect of the same matter" occurring in S. 28 of the Code of Civil Procedure warrant a narrower construction being placed upon the section than that which the English Courts have adopted with reference to the corresponding English rule (R. S. C. O. XVI R. 4), we feel no doubt that the "matter" in the present case is the same. As regards the Indian authorities, reference need only be made to *Byathamma v. Avulla*², *Gangi v. Addala Ramasami*³, *Raghunatha Mukund v. Sarosh K. B. Rama*⁴ and *Hira Lal Mozundar v. Prosunnachunder Biswas*⁵. Mr. Krishnasamy Iyer sought to distinguish the last mentioned case on the ground that when, as in that case, a suit was brought under the provisions of S. 283 of the Code, the making of the order constituted the cause of action. But this is not so. When a suit is brought under that section, the attachment is the cause of action and different purchasers of the attached property may be properly joined as defendants in the same suit. So here the wrongful sale is the cause of action, and the different purchasers at the sale were rightly joined as defendants.

Dorasami
Pillai
v.
Muthasami
Mooppan.

We think the plaintiffs are entitled to the declaration for which they ask. We accordingly set aside the decrees of the lower Courts and make the declaration as prayed. The plaintiffs are entitled to their costs throughout.

1. 26 Ch. D. p. 35.

3. I. L. R., 25 M. 736.

5. 2 C. L. R., 556.

2. I. L. R., 15 M. 19.

4. I. L. R., 23 B. 266.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Boddam and Mr. Justice Bhashyam Aiyangar.

Rajaram ... Appellant* (*Surety*).

v.

Bappu Chettiar ... Respondent (*Decree-holder*).Rajaram
v.
Bappu
Chettiar.*Civil Procedure Code, Ss. 244, 253, 336 and 349—Security given under S. 336—Applicability of provisions of S. 253 to realization of security under S. 336—Order directing security to be realized—Decree—Appeal.*

An order against a surety under S. 253, C. P. C., is appealable in the same manner as orders passed under S. 244, C. P. C., in execution of decrees.

S. 336, C. P. C., extends the provisions of S. 253, C. P. C., to the enforcement of the bond against the surety and an order against a surety under S. 336 is also therefore, appealable.

Where the judgment-debtor applies within one month to be declared an insolvent, the surety under S. 336 is discharged.

*Imbichunni Nayar v. Lalji Ram Dos Sait*¹ and *Krishnaier v. Krishnasamy Aiyar*² followed.

Appeal from the order of the District Court of Tanjore, in A. A. O. No. 908 of 1902, presented against the order of the Court of the District Munsiff of Tanjore, in E. P. No. 52 of 1902, in O. S. No. 170 of 1889.

P. S. Sivaswami Aiyar for appellant.

C. Sankaran Nair for respondent.

The court delivered the following

JUDGMENT:—In this case a preliminary objection is taken that no appeal lies.

The appeal is from an order directing that the security given by a surety under S. 336, C. P. C., should be realized in execution against the surety.

S. 336 extends the provisions of S. 253 of the Code of Civil Procedure to the enforcement of the bond against the surety, and there is a uniform course of decisions in the case of an order against a surety under S. 253 of the Code that the order is appealable in

* A. A. O. No. 9 of 1903 and C. B. C. No. 31 of 1903.

24th August 1903.

1. I. L. R., 24 M. 560.

2. I. L. R., 26 M. 866.

the same manner as orders passed under S. 244 of the Code in execution of decrees. These decisions must in principle be equally applicable to orders against sureties under S. 336. We, therefore, overrule the preliminary objection and hold that an appeal lay to the lower appellate court and a second appeal to this court. The cases cited *Krishnan Nayar v. Ittinan Nayar*¹, *Banna Mal v. Jamna Das*² do not apply. The former applies to the case of a surety under S. 349 or at all events not under this section, and this question was not raised or considered. The case of *Bunna Mal v. Jamna Das*² was an appeal from an order refusing to grant the petition of the surety to be discharged from his surety bond and does not in any way raise the question. On the merits following the decisions in *Imbichunni Nayar v. Lalji Ram Dos Sait*³, *Krishnaiyer v. Krishnasamy Aiyer*¹, respectively, we hold that the surety was discharged inasmuch as the judgment-debtor did apply within one month to be declared an insolvent.

Rajaram
v.
Bappu
Chettiar.

We, therefore, reverse the orders of the courts below and dismiss the plaintiff's application to enforce the surety bond against the surety with costs throughout.

As an appeal lies, the revision petition is dismissed but without costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Boddam and Mr. Justice Bhashyam Aiyangar.

Ramakrishna Chettiar ... Appellant* (Plaintiff).

v.

Appa Row ... Respondent (Defendant).

Rent Recovery Act, Ss. 7 and 8—Limitation Act, Arts. 110 and 116—Adjudication by Civil Court that permanent patta should be tendered and muchilika executed—Res judicata—Tender of permanent patta—Refusal by tenant—Suit for rent maintainable—No necessity of tender for each fasli—Limitation.

Ramakrishna
Chettiar
v.
Appa Row.

Under S. 9 of the Rent Recovery Act a landlord can maintain a suit for the recovery of rent though there has been no exchange of patta and muchilika provided he has tendered such a patta as the tenant is bound to accept.

* S. A. Nos. 121 and 122 of 1902.

8th September 1903.

1. I. L. R., 24 M. 637.

3. I. L. R., 24 M. 560.

2. I. L. R., 15 A. 183.

4. I. L. R., 26 M. 366.

Ramakrishna Chettiar v. Appa Row. Where there is an adjudication in a Civil Court that the landlord should tender a permanent patta and the tenant should execute a corresponding muchilika after such tender it is *res-judicata* as between the parties thereto.

Where there is a tender of such a permanent patta by the landlord, no fresh tender of patta by the landlord is necessary for each fasli and the landlord can maintain a suit for rent against the tenant upon the strength of such tender.

A tender of a patta not accepted by the tenant is not a contract between the parties though a suit for rent is maintainable under S. 7 of the Rent Recovery Act.

A suit for rent brought by the landlord after tender of a registered patta but refused by the tenant is not governed by the 6 years' rule of limitation provided by Art. 116 of the Limitation Act but by the rule of 3 years under Art. 110.

Second appeals from the decrees of the District Court of Salem in A. S. Nos. 180 and 201 of 1900, presented against the decree of the Court of the District Munsif of Krishnagiri in O. S. No. 11 of 1900.

V. Krishnaswami Aiyar and C. Venkata Subbaramiah for appellant.

C. Ramachandra Rao Sahib for respondent.

The Court delivered the following

JUDGMENT:—Prior to the institution of the former suit by the same plaintiff against the same defendant, O. S. No. 140 of 1882, the plaintiff had tendered to the defendant a permanent patta fixing the rent at the rate now claimed, and it was decided in that suit that the defendant was bound to accept that patta, and that accordingly he should accept it and execute a muchilika. As a matter of fact the patta was not accepted nor the muchilika executed by the defendant after that decree. The present suit is for the recovery of arrears of rent for over four years prior to the suit at the rate specified in the patta already referred to which had been registered prior to its being tendered. The District Munsif decreed the plaintiff's claim for rent for three years and disallowed the prior rent claimed on the ground that it was barred by limitation. Both parties appealed to the District Judge with the result that the District Judge dismissed the suit on the ground that no pattas and muchilikas had been exchanged for the fasli for which rent was claimed.

In our opinion there was no necessity for the exchange of pattas and muchilikas for these years or for tender of patta by the plaintiff.

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Under S. 9 of the Rent Recovery Act a landlord can maintain a suit for the recovery of rent though there has been no exchange of patta and muchilika, provided he had tendered such a patta as the tenant was bound to accept and the adjudication in O. S. No. 140 of 1882 that the tenant was bound to accept the permanent patta which had been tendered to him is binding upon the parties as *res judicata*. The plaintiff, therefore, having tendered a patta embracing the fasli in question, which patta the tenant was bound to accept, we hold that he was not bound to tender a fresh patta for each or all of those faslis and can maintain this suit relying upon the tender of the permanent patta.

We therefore allow S. A. No. 121 with costs in this and the lower appellate court, and reversing the decree of the lower appellate court, restore that of the District Munsif. In S. A. No. 122, which relates to the rent disallowed by the District Munsif, the appellant's vakil argues that inasmuch as the patta he tendered was a registered one, the article of the Limitation Act applicable is 116, which prescribes a period of six years in the case of a suit "for compensation for breach of a contract in writing registered".

We are clearly of opinion that the registered patta tendered but which had been refused cannot be regarded as, or operate as, a contract entered into between the parties, though under S. 7 of the Rent Recovery Act, a suit may be brought to recover the rent payable by the tenant relying on the tender of a proper patta though it has not been accepted but refused as the tenant did not agree to it.

The decision of the District Munsif on the question of limitation is right, and we confirm the decree of the lower appellate court on that ground and dismiss this second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr Justice Benson and Mr. Justice Bhashyam Aiyangar.

Narayanasawmi Reddiyar ... Appellant* (*Plaintiff*).

v.

The Madras Railway Company (Limited). Respondent (*Defendant*).Narayana-
sawmi
Reddiyarv.
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Company
(Limited).*Contract—Building contract—Original time for performance—Penalty—Extra work given—Implied variation of time when extra work connected with original work.*

In the case of building contracts if the building owner has ordered extra work beyond that specified by the original contract which has necessarily increased the time requisite for finishing the work, he is thereby prevented from claiming the penalties for non-completion provided by the contract.

If the extra work is not one which the contractor is bound to undertake but which he nevertheless undertakes and if such extra work cannot be regarded as a separate and independent work but is one connected with the work originally stipulated for, the offer and the acceptance of such additional work will, by necessary implication, operate as a variation of the original contract as to the time therein fixed for the completion of the work. If the extra work is an independent work unconnected with the contract, then there can be no variation by implication of the original contract as to time.

The term fixed in a contract for its completion must, in the absence of a contract to the contrary, be taken to be with reference to the work specified in the contract and not with reference also to unspecified extra work which might be ordered under the contract.

Where a contract which consists in the doing of certain work is not indivisible but severable each of the works therein referred to being itself an entire contract upon the completion of which the contractor would be entitled to receive payment there for according to the rates mentioned in the contract, non-performance by one party of his promise with reference to one portion of the contract will not excuse the other of his liabilities under another portion of the contract.

Where security is given by a contractor to a company and the amount so deposited as security for the performance by the contractor of his obligations is neither treated by the contract as a penalty nor as liquidated damages but is to be applied "towards satisfaction of any loss or damage which the company may sustain or incur" the company cannot forfeit the amount upon the breach of any of the contractor's obligations but is entitled to recoup itself for any damage arising from the breach of the contractor who will be entitled to recover the balance, if any, of the amount so deposited.

On appeal from the judgment of the Honourable Mr. Justice Boddam, in the Ordinary Original Jurisdiction of this Court in C. S. No. 149 of 1901.

* O. S. A. No. 15 of 1902.

4th August 1903.

P. S. Sivaswami Aiyar for appellant.

A. S. Cowdell and Barclay, Orr and David and Brightwell for respondent.

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The Court delivered the following

JUDGMENT:—This is an appeal against the decree of *Boddam, J.*, dismissing the suit brought by the appellant as the assignee (Exhibit W) of all “the moneys and outstandings” due, from the respondent, to one Mr. O’Shaughnessy under a contract (Exhibit B) between him and the respondent, in regard to the construction of the Kolar Gold Fields Realignment Line. The suit was for the recovery of Rs. 8,361-13-11, being the balance (with interest) alleged to be due under the said contract, after giving credit to the sum of Rs. 6,498-3-11 (Exhibit KK) paid by the Company to the appellant as the assignee of Mr. O’Shaughnessy. The amount sued for consists of two items:—i. e., a sum of Rs. 3,000, being the amount deposited by Mr. O’Shaughnessy as security for the performance of the contract and another sum of Rs. 4,767-12-7, representing the 10 per cent. deductions withheld by the Company, (under the provisions of the contract) as further security, from payments made, from time to time, to Mr. O’Shaughnessy (and subsequent to the assignment, to the appellant) for works actually done by Mr. O’Shaughnessy before the 21st June 1900, on which date the Railway Company, under the provisions of the contract, took over the remaining works from his hands, after giving him due notice (Exhibit 26) and entrusted the same to the appellant, under a fresh and independent contract (Exhibit S) entered into with him.

The respondent resists the appellant’s claim principally on two grounds, viz., (1) that Mr. O’Shaughnessy having failed to complete the works within the stipulated time, to the satisfaction of the District Engineer, has forfeited the two items claimed in the suit; and (2) that by reason of his breach of contract the Company has sustained loss and damage to the extent of Rs. 10,300-11-8 (paragraph 7 of the written statement) and the Government of His Highness the Maharajah of Mysore,—for whose benefit the contract was entered into by the respondent—has also “lost profits and incurred liabilities far exceeding the amount claimed” (paragraph 9 of the written statement).

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In support of the appeal it is urged that there was really no breach of contract by Mr. O'Shaughnessy as he was unable to complete the works within the stipulated time partly because of the laches and negligence of the respondent (in furnishing him with the plan of one of the bridges to be built) and partly in consequence of the fact that the quantity of work which had to be actually done turned out to be much in excess of the estimated quantity and that the respondent therefore acted unlawfully in taking over the unfinished works from Mr. O'Shaughnessy. It is further contended that even if Mr. O'Shaughnessy had committed a breach of contract, the respondent has sustained no loss or damage thereby, inasmuch as the unfinished works were entrusted to the appellant at the same rates as under Mr. O'Shaughnessy's contract and that the item of Rs. 7,400 representing the cost of the special establishment continued to be maintained by the Company in connection with the unfinished contract work, from the 3rd June to February 1901, and the items of loss of profits to and liabilities incurred by the Government of Mysore (in consequence of the working of the realignment line having been delayed) cannot be claimed as damages flowing from the alleged breach of contract by Mr. O'Shaughnessy.

If either of these contentions prevails, the appellant will be entitled to the whole amount sued for (subject to any deduction that may have to be made in the matter of interest).

We find it impossible to uphold the first contention. The learned Vakil for the appellant relying upon *Holme v. Guppy*¹ and *Dodd v. Churton*² argues that as Mr. O'Shaughnessy was required to do a larger quantity of work than that provided for in the contract, he was not bound by the term fixed therein for the completion of the contract—i. e., the period of 6 months (from the 4th November 1899, when the lands were put in his possession) ending with the 3rd May 1900. The principle laid down in those two cases,—which relate to building contracts—is that 'if the building owner has ordered extra work beyond that specified by the original contract, which has necessarily increased the time requisite for finishing the work, he is thereby prevented from claiming the penalties for non-

1. 3 M. & W. 387.

2. [1897] 1 Q. B. 562.

completion provided for by the contract'. If the extra work be one which the contractor was not bound to undertake, but which he nevertheless undertakes and if such extra work cannot be regarded as a separate and independent work, but is one connected with the work originally stipulated for, the offer and the acceptance of such additional work will, by necessary implication, operate as a variation of the original contract, as to the time therein fixed for the completion of the work. In *Westwood v. The Secretary of State for India*¹ it was decided that the same rule would apply even if, under the terms of the original contract, the builder had agreed 'to do any extra work which the building owner or his architect might order'. The principle of this decision would seem to be that the term fixed in a contract for its completion must be taken to be with reference to the works specified in the contract and not with reference also to unspecified extra works which might be ordered under the contract. In *Jones v. St. John's College*² it was held that the ruling in *Westwood v. The Secretary of State for India*¹ was inapplicable to a case in which the builder had, in the contract, agreed that "if any extra work was ordered, whatever that work might be, he would undertake, nevertheless, to complete the works within the time originally specified by the contract." In the present case it has not been shown whether the extra work consisted in the alteration or enlargement of the work specified in the contract or also of independent works. All that the appellant's Vakil was able to point out was that certain works, and, in particular, rock-cutting work, which it was found had to be done, was much in excess of the quantity specified in the contract, apparently by estimate. If the excess was such as would necessarily increase the time specified in the contract, *Westwood v. The Secretary of State for India*¹ would be authority for holding that there is no breach of contract if the whole work is not completed within the specified time, and *Holme v. Guppy*³ would be authority in favor of the same position, even if the contractor was not bound to take up the extra work. In the present case, however, a reference to Exhibits 20 to 25 (ranging from the 4th May to the 18th June 1900) clearly shows that by reason of the work to be done being in excess of the estimated quantities, the contractor sought an extension of time and that the Railway authorities resolved upon

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1. 7. L. T. 736.

2. L. R., 6 Q. B. 115.

3. 3 M. & W. 387.

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granting an extension of one month's time (ending with the 3rd June 1900) and communicated the same to Mr. O'Shaughnessy. The latter acquiesced in it and raised no objection as to the insufficiency of the extension. We cannot accede to the appellant's contention that the extension was only a unilateral act on the part of the respondent and that Mr. O'Shaughnessy could not be regarded as having consented to it. If he did not consent, it was clearly his duty so to inform the Company and his silence under the circumstances amounts to consent on his part. This being so, it must be held that Mr. O'Shaughnessy committed a breach of contract in failing to complete the works on or before the 3rd June 1900, unless he can lawfully plead in justification that subsequent to the 4th May 1900 (on which date a month's extension was granted to him) the Railway Company committed default, in furnishing him with the plan of bridge No. 10 so late as the 18th May 1900 it being admitted that the construction of the bridge could not have been finished in less than six weeks after the plan was furnished. This plea would no doubt be valid if the contract embodied in Exhibit B were an indivisible one in respect of all the works therein referred to. But in our opinion the contract is not an indivisible one, but a severable one, each of the works therein referred to being itself an entire contract upon the completion of which the contractor would be entitled to receive the price thereof, according to the schedule rates, *Government of Newfoundland v. Newfoundland Railway Company*¹; and payments have accordingly been made from time to time, on separate bills, to Mr. O'Shaughnessy. Whatever doubt might exist as to the separate entirety of certain kinds of works, there can be no doubt that the construction of bridge No. 10 is an entire and separate work in itself. The provision made in the contract as to the withholding of 10 per cent. of the amount of each bill as further security for the completion of all the works to the satisfaction of the District Engineer is by no means inconsistent with the contract being severable. The original deposit (by way of security) of Rs. 3,000, and the 10 per cent. deductions, only formed an indivisible consolidated security for the due performance of each and all of the several works. It is not urged that the Company's delay in furnishing the plan for the bridge (No. 10) could in any way

1. Hudson on Building Contracts (2nd Ed.), Vol. I, p. 186.

account for the non-completion of the other works within the extended period. The Company was therefore in our opinion justified, under the terms of the contract, in taking over the other unfinished works from Mr. O'Shaughnessy, though it may be that it was not entitled to do so in respect of Bridge No. 10. We may here observe that if Mr. O'Shaughnessy had considered that he was not guilty of breach of contract in not completing the works before the 3rd June 1900, it is incredible that he would not have protested against the action of the Company either on the receipt of the notice (Exhibit 26) or within a reasonable time thereafter.

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It is however impossible to accede to the respondent's contention that under the terms of the contract, the amount lodged as security and the 10 per cent. deductions made as further security have been forfeited to the Company as the works were not completed to the satisfaction of the Engineer and within the stipulated time. This contention proceeds on a total misapprehension of the terms of the contract. The contract does not treat the said amount as a penalty or even as liquidated damages. It is money belonging to the contractor, which, under the express terms of the contract, is held by the Company merely as security "to be applied in or towards satisfaction of any loss or damage which the Company may sustain or incur" by reason of the contractor's breach of contract. He may be guilty of a breach, either because he has not completed the work within the stipulated time or because such work, though completed in time, is not to the satisfaction of the Engineer. In either case, the onus is on the Company to prove the actual damage sustained by reason of the non-completion of the works within the stipulated time or by reason of defects in the quality of the work; and if the amount of damages thus proved does not exceed the amount of the security, the contractor will be entitled to recover the balance. We are unable to agree with the contention of the respondent's counsel and the finding of the learned Judge that Exhibit KK amounts to an admission on the part of the appellant that the Railway Company had the right to retain the 10 per cent. deduction "*for ever*". Exhibit KK is merely an acquittance in favour of the Company in respect of the amount of the bills for Rs. 6,907-6-6, therein referred to, and not in respect of the 10 per cent. deductions therefrom, which must be treated as a deposit made by the appellant

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(as Mr. O'Shaughnessy's assignee) as further security, out of the amount of the bills.

The real question therefore in the case, is whether the Railway Company has sustained any and, if so, what amount of damage.

The first item of damage claimed is the cost of the special establishment maintained by the Company in connection with the carrying out of the works included in Mr. O'Shaughnessy's contract. This establishment was necessary to point out the works to be done by the contractor and for measuring and supervising the works while being executed. The cost of the establishment, no doubt, is borne entirely by the Railway Company. But if the works had been completed within the specified time, the special establishment would not have had to be continued beyond that period. From the very nature of the purpose for which the establishment was maintained, Mr. O'Shaughnessy (when he made the contract) must have known that one result of his failure to complete the works in time would be the loss which the Company would incur by having to continue the establishment till the works should be completed. This item therefore is not any remote or indirect loss sustained by the Company. As a matter of fact the special establishment appears to have been continued at full strength till December 1900 and for two months longer on a reduced scale, at a cost of about Rs. 7,400 (from the 3rd June, when the month's extension given to Mr. O'Shaughnessy expired). The question to be considered is whether the Company is justified in claiming in this suit the costs of this establishment for the whole of this period. No further extension was granted to Mr. O'Shaughnessy, but the Company on the 21st June 1900 exercised its right under the provisions of the contract and taking over the unfinished works from him entrusted the carrying out of the same to the appellant under a fresh contract (Exhibit S). This fresh contract was actually signed only on the 24th July 1900, and the time fixed therein for the completion of the unfinished works was two months from that date (expiring with the 24th September 1900.) But, as a matter of fact, the appellant, who appears to have been originally Mr. O'Shaughnessy's sub-contractor, continued the works from the 21st June, in anticipation of the execution of

Exhibit S. He however failed to complete the works within the specified time and delayed the completion till November or December. Mr. Scott, the Assistant Engineer, deposes that the two months' period fixed in Exhibit S was sufficient for the completion of the unfinished works and there is nothing in the evidence to justify the delay on the part of the appellant, the new contractor, according to the principles laid down in *Dodd v. Churton*¹ already referred to. It must therefore be taken that the retention of the special establishment beyond the 24th September 1900 was the result only of the appellant's breach of contract. The learned counsel for the respondent contends that even in that view Mr. O'Shaughnessy is also liable for the loss arising from the appellant's breach of contract and that such loss must be regarded as the natural result of the breach of the original contract by Mr. O'Shaughnessy. Under the provisions of the contract (Exhibit B), the Company was, no doubt, at liberty to have the unfinished works carried out either by the employment of day labour or by entrusting them to a new contractor. But it is impossible to accede to the contention that the loss arising from a breach of contract by the new contractor is a natural or likely result of the breach of contract by Mr. O'Shaughnessy. The fact that the appellant, the new contractor, is the assignee of Mr. O'Shaughnessy's benefits under the original contract does not in the least affect the question; and the case of the "Arbitration between the Yeaton Water Works Company and Binns"² and the explanation to S. 73 of the Indian Contract Act both of which are strongly relied upon by the respondent's counsel have no bearing whatever upon the question. The Company does not in this suit claim to set off any loss it sustained by reason of the appellant's breach of contract, against any balance (that may be due to him as Mr. O'Shaughnessy's assignee) out of Mr. O'Shaughnessy's security amounts; in fact it is admitted that the accounts between the appellant and the Company in respect of his own contract have been fully adjusted. We therefore hold that the respondent can, as against Mr. O'Shaughnessy claim as damages, the cost of the special establishment from the 3rd June only up to the 24th September 1900. Such cost according to the Company's accounts amounts only to Rs. 3,564-3-4 which portion alone can be deducted from the security held by the Company.

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1. [1897] 1 Q. B. 562.

2. 72 L. T. 538.

Mr. Scott, Mr. Pawley and Mr. Stoney (Engineers of the Company) have all deposed that the special establishment was continued for the purpose of the completion of the works left unfinished by Mr. O'Shaughnessy. The appellant's pleader contends that some deductions ought to be made from the costs of the establishment. But as the statement of the Engineers was left unchallenged and nothing has been elicited (in cross-examination) which would warrant any deduction (on account of the bridge No. 10 or other works unconnected with the contract in question), it is not possible to allow any deduction from the cost of the establishment.

The other item of damages alleged in para. 9 of the written statement is very indefinite and our attention has not been drawn to any evidence showing the nature of the damage or that the same was in the contemplation of the parties, (when the contract was made) as the probable result of delay in the completion of the Re-alignment Line. It is explained to us that the expenses in working the line would, to the sole benefit of the Mysore Durbar, be reduced by about 10 per cent. by the Re-alignment Line and that the delay in the completion of this line resulted in a loss to the Mysore Durbar so long as the working of the old line had to be continued during such delay. This no doubt might have been in the contemplation of the Company; but there is no evidence to show that this was known or communicated to Mr. O'Shaughnessy and we agree with the learned Judge who tried the case that the damages claimed on account of the loss of the profits anticipated by the Company under this head are too remote and cannot be allowed.

The appellant will be entitled to charge interest at 6 per cent. upon the Rs. 8,000 Government security (together with the interest accrued thereon up to the 24th September 1900) and on the sum of Rs. 3,988-3-5 (the amount of the 10 per cent. deductions from bills) only from the 24th September 1900 (when the works ought to have been finished under the new contract). Credit must be given to the respondent in the sum of Rs. 3,564-3-4 being the cost of the special establishment from the 3rd June to the 24th September 1900.

We, therefore, allow the appeal and give the plaintiff a decree for the balance of Rs. 3,586-0-0 due to him with interest thereon at 6 per cent. from the 24th September 1900 till date of payment.

Though in the notice (dated the 19th June 1900) Exhibit 26, the Company took the right view and merely stated that the security and deposit would be appropriated against any loss which the Company might incur by the breach of the contract, yet notice (Exhibit NN) was subsequently given to the plaintiff claiming the whole amount of the security and the deposits as having been forfeited to the Company by reason of Mr. O'Shaughnessy's breach of contract. The appellant was therefore driven to the necessity of bringing this suit; and the respondent must bear his own costs and pay the appellant's costs throughout, pleader's fee however being allowed only on the amount decreed in favour of the appellant, viz., Rs. 3,586.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam and Mr. Bhashyam Aiyangar.

Muthuvaian represented by his Agent

Venkatramier ... Appellant* (*Appellant in C.
M. A. No. 148 of 1902, on
the file of the High Court.*)
v.

Periasami Iyen and others... Respondents (*Respondents
in do.*)

Civil Procedure Code, S. 588—Letters Patent, S. 15—Meaning of “final”—Judgment of a single Judge of High Court—Appealability.

The word “final” in the concluding sentence of S. 588, Civil Procedure Code, is used not in the sense that a judgment or order falling under that section is not subject to review by the same court or to revision by the High Court or to appeal to His Majesty in Council, but in the sense that there shall be no second appeal to a Court of a higher grade.

A judgment passed by a single judge of a High Court in an appeal from an order mentioned in S. 588, Civil Procedure Code, is appealable under S. 15 of the Letters Patent.

*Hurrish Chunder Chowdhry v. Kalisunderi Debi*¹ and *Sabapathi Chetti v. Narayanasami Chetti*² referred to.

* L. P. A. No. 14 of 1903.

1. I. L. R., 9 C. 482.

11th September 1903.

2. I. L. R., 25 M. 555.

Muthuvaian
v.
Periasami
Iyen.

Application under S. 15 of the Letters Patent presented against the Judgment of the Honourable Mr. Justice Davies, dated 19th January 1903, passed in A. A. O. No. 148 of 1902, preferred from the order of the Subordinate Judge's Court of Kumbakonam, dated 20th August 1902, in C. M. P. No. 544 of 1902 in A. S. No. 481 of 1901.

P. S. Sivaswami Aiyar and *C. V. Krishnaswami Aiyar* for appellant.

T. Natesa Aiyar for respondents.

The Court delivered the following

JUDGMENT:—Although the matter immediately dealt with by the Privy Council in *Hurriah Chunder Chowdhry v. Kalisunderi Debi*¹, and by this Court in *Sabapathi v. Narayanasami*² related to the opening sentence of S. 588, Civil Procedure Code, and it was held that S. 585 does not operate to control S. 15 of the Letters Patent which provides for an appeal from the Judgment of single judge of the High Court to the High Court, yet the reasoning upon which the decisions proceed and particularly the decisions in *Subapathi v. Narayanasami*³ are equally applicable to the construction to be placed on the concluding sentence of S. 588, Civil Procedure Code, declaring that orders passed in appeals under that section shall be final.

It is clear that the word 'final' is not used in the sense that it is not subject to review by the same Court or to revision by the High Court or to appeal to His Majesty in Council under S. 595, Civil Procedure Code.

The word 'final' is used in the section simply in the sense that there shall be no second appeal to a court of a higher grade, and in this view it is not inconsistent with the provision made by S. 15 of the Letters Patent in appeals from the judgment of one judge of the High Court to the High Court.

We, therefore, overrule the preliminary objection. On the merits there is no ground for this appeal.

This appeal is dismissed with costs.

1. I. L. R., 9 C. 492.

2. I. L. R., 2: M. 555.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam and Mr. Justice Bhashyam Aiyangar.

Achutan Nair and another... *Plaintiffs.**

v.

Kunjunni Nair and another... *Defendants.*

Act IX of 1887, Schedule II, Arts. 11 and 38—Junior member of a tarwad—Claim against Karnavan to enforce rights in respect of tarwad property—Suit cognizable by Small Cause Court.

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v.
Kunjunni
Nair.

A claim by the junior members of a tarwad against the karnavan to enforce their rights to participate in the joint enjoyment of the tarwad property according to a family karar is not “a suit relating to maintenance” within the meaning of Art. 38, Schedule II of Act IX of 1887, but is “a suit for the enforcement of a right to or interest in immoveable property” of the tarwad and is not cognizable by a Court of Small Causes under Art. 11, Schedule II of Act IX of 1887.

Case stated under S. 646(B), Act XIV of 1882, by the District Judge of South Malabar at Calicut referring for the orders of the High Court the S. C. Suit No. 961 of 1902 on the file of the Subordinate Judge's Court at Palghat.

Parties not represented.

The Court expressed the following

OPINION :—The suit is brought by the junior members of a tarwad against the karnavan and their claim is to enforce their right to participate in the joint enjoyment of the tarwad property in accordance with the terms of the family karar. The case referred to by the Subordinate Judge is the claim of a female member of a joint Hindu family under the Mitakshara law to separate maintenance and is wholly different inasmuch as she is not a joint owner with the other members, but is entitled only to maintenance.

This suit, therefore, is not “a suit relating to maintenance” within the meaning of Art. 38 of the 2nd Schedule of Act IX of 1887, but it is within the meaning of Art. 11 of the same schedule—“a suit for the enforcement of right to or interest in immoveable property” of the tarwad, and in that view it is not cognisable by a Court of Small Causes.

* Referred Case No. 4 of 1903.

14th September 1903.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Boddam and Mr. Justice Bhashyam Aiyangar.

K. Thiruvengidachariar ... Appellant* (*Plaintiff*).

v.

Ranganatha Aiyangar and others ... Respondents (*Defendants*
1 to 3, 5 to 8).Thiruvengidachariar
v.Ranganatha
Aiyangar.*Transfer of property—Transfer of immoveable property—Compromise of claims—Sale, gift or exchange—Writing unnecessary.*

A transfer made in compromise of a claim is neither a sale nor a gift nor an exchange and no writing is necessary under the Transfer of Property Act to validate the same though such transfer may relate to immoveable property.

Where land belonging to the plaintiff's sister was sold by plaintiff and his brothers to a stranger and certain other land belonging to the family was allowed by the plaintiff and his brothers to be retained and enjoyed by the sister and excluded from the family partition.

Held (1) that the sister acquired a good title to the same,
and (2) that the plaintiff could not get any share in the same.

Second appeal from the decree of the District Court of Chingleput in A. S. No. 131 of 1901, presented against the decree of the Court of the District Munsif of Chingleput in O. S. No. 270 of 1899.

C. V. Anantakrishna Aiyar for appellant.

T. V. Seshagiri Aiyar for respondents.

The Court delivered the following

JUDGMENT :—The decision is clearly right as regards items Nos. 2 to 5.

As regards item No. 1 whether the same was transferred by the father or by the brothers, it is not invalid by reason that it is not in writing registered. It is clear from paragraph 17 of the Munsif's judgment that some other land belonging to the sister was sold by the plaintiff and his brothers about three years before the partition from which item No. 1 was excluded. The sister, therefore, had a claim against the brothers in respect of their having disposed of her land. It is, therefore, clear that plaintiff item No. 1 was allowed by the brothers to be retained and enjoyed by the sister by way of compromise of her claim in respect of the land belonging to her which they had sold. Such being the real character of the transaction, it is not a gift nor a sale nor an exchange under the Transfer of Property Act. No writing therefore was necessary and this appeal is dismissed with costs.

* S. A. No. 190 of 1902.

14th September 1903.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*.

Mr. Justice Subrahmania Aiyar, and Mr. Justice Boddam.

Parthasarathy Appa Row ... Appellant* (*1st Counter-Petitioner, Pltff*).

v.

Appa Row and another ... Respondents (*Petitioner and 2nd Counter Petitioner, 1st and 2nd Defendants.*)

Civil Procedure Code, S. 502—Conditions of applicability—Property or fund in another court in another suit—Person clearly entitled—Jurisdiction of court. Parthasara-
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Held, by the Full Bench (Subramania Aiyar, J., dissenting), that an order under S. 502, Civil Procedure Code (for delivery of money) cannot be made. Rangiah
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(a). Where the party making the admission does not hold the property or other thing which the party applying for the order seeks to have delivered to him,

or (b). Where the property or other thing is held by another court to the credit of another suit.

Where, therefore, the Medur Ranee brought a suit against Papamma Row for recovery of the Medur estate and jewels and other moveable properties, and Papamma Row was appointed receiver and directed to deliver the jewels, cash, &c., to the Madras Bank at Coconada to the credit of the suit, and there was a sum of ten lakhs of Rupees to the credit of this suit, and after the Medur Ranee's death the litigation was continued by the next heirs and was pending on appeal in the High Court, and litigation also ensued after Papamma Row's death among the next heirs after Papamma Row for Nidadavolu and Medur estates, who were also parties to the Medur litigation, and in such litigation it was admitted by all the parties that the defendants would be entitled to at least one-third, and one of the defendants applied under S. 502, Civil Procedure Code, for one-third of the cash in the Bank to the credit of the Medur suit.

Held—(Subrahmania Aiyar, J. dissenting) that S. 502 did not apply.

Per Subrahmania Aiyar, J:—

- (1) S. 502, Civil Procedure Code, is not confined in its operation to cases where the money or thing capable of delivery is actually held by a party to the suit.
- (2) The inherent power of a court could not be invoked except for the limited purpose of preserving and enforcing order, securing efficiency and preventing abuse of process in the exercise of a jurisdiction which the court otherwise possesses.
- (3) That the custody by a court of property belonging to litigants does not give the court any arbitrary power over it.

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- (4) That though such custody cannot be interfered with by the orders of another court this is but a rule of comity intended solely to avoid unseemly collisions in the execution of process of different authorities.
- (5) That the rule in question is not a rigid and inflexible one, but is capable of adaptation to circumstances and can never be worked so as to defeat or obstruct the doing of justice in due course, and consequently in no way interferes with the power of a court other than that having custody to pass orders touching the property where it has jurisdiction to pass the orders and bind the parties in connection with whose litigation the custody of the other court began.
- (6) It is incumbent on the court having the custody on due application being made to it to give effect to such an order in so far as it is not inconsistent with the performance of its own duties respecting the property in the litigation before itself.

Per *Arnold White*, C. J., (*Boddam*, J. concurring).

- (1) Where property is the subject of legal proceedings the court has, no doubt, jurisdiction in certain circumstances to allow the payment of the income of the property to parties interested.
- (2) At any rate a High Court in this country has jurisdiction to make an order *pendente lite* for the payment of moneys in the hands of a receiver, to one of the parties to a suit.

Appeal from the order of the District Court of Godavari, dated 15th September 1902, passed on C. M. P. No. 510 of 1902 in O. S. No. 44 of 1899.

C. Sankaran Nair, *S. Gopalasamy Aiyangar* and *C. R. Tiruvengkatachariar* for appellant.

T. Rama Row, *V. Krishnaswami Aiyar* and *P. R. Sundara Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—THE CHIEF JUSTICE.—This is an appeal against an order of the District Court of Godavari directing the payment out of Court of one-third of certain moneys standing to the credit of Original Suit No. 35 of 1895 in the Subordinate Judge's Court of Masulipatam on security being furnished. The material facts and dates with reference to the circumstances in which the application was made are as follows:—

In 1895 the Medur Ranee instituted Original Suit No. 35 of 1895 in the Masulipatam Court to recover possession of the Medur

Estate. One Papamma Row and the Court of Wards were made defendants to that suit. For the purposes of to-day it will be sufficient to say generally that Papamma Row alleged that she had validly adopted Narayya Appa Row, the son of the Medur Rane. The boy died during the life-time of the Medur Rane and of Papamma Row. The Medur Rane claimed the Medur property on the ground of her rights as natural mother, whilst Papamma Row claimed it on the ground of her rights as adoptive mother of the deceased boy. At the time of the institution of the suit the Court of Wards were in possession of the estate on behalf of the boy. In that suit an application was made by the Court of Wards for the appointment of a Receiver. The matter came before the High Court on appeal and on July 29th, 1898, an order for payment into Court was made by the High Court. By that order Papamma Row (the 1st defendant) was appointed Receiver in place of the then Receiver and the latter was ordered to deposit in the Bank of Madras at Cocanada all the jewels and securities in his possession and to pay into the Bank any balance of cash that might remain after payment of all legal charges, the money to be invested and to stand to the credit of Original Suit No. 35 of 1895. In pursuance of this order the money, in round figures some ten lakhs of rupees, was paid into Court to the credit of Original Suit No. 35 of 1895 in the Masulipatam Court. As a matter of fact, for purposes of convenience, the money was deposited in the local branch of the Madras Bank. In March 1899, the Medur Rane died and the two respondents to the appeal now before this Court were brought on the record as the 2nd and 3rd plaintiffs in Original Suit No. 35 of 1895. This suit was heard and on December 2nd, 1899, it was dismissed. The plaintiffs appealed to this Court and their appeal is now pending. Two days after the dismissal of the suit, Papamma Row died, and the present appellant, as the representative of Papamma Row, was made a respondent to the appeal by the plaintiffs in Original Suit No. 35 of 1895. His case is that he stands in the same degree of relationship with the common ancestor as the 2nd and 3rd plaintiffs in Original Suit No. 35 of 1895 and that he is entitled to the estate jointly with them. On December 14th, 1899, the present appellant instituted Original Suit No. 44 of 1899 in the District Court of Godavari against the two plaintiffs in Original Suit No. 35 of 1895. In this

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suit he claimed partition of the Medur Estate and also of another estate known as the Nidadavole Estate. Papamma Row had derived her right to this estate through her husband. The present appellant's case with regard to the Nidadavole Estate also is that he stands in the same decree of relationship with the common ancestor as the two defendants to the suit (2nd and 3rd plaintiffs in Original Suit No. 35 of 1895 and the present respondents) and that he is entitled to this estate jointly with them. The case of the 1st of the present respondents as regards the Nidadavole Estate is that he is entitled to the whole of that estate by right of primogeniture.

On January 26th, 1900, a Receiver was appointed in Original Suit No. 44 of 1899 for the Nidadavole and Medur Estates and for the moveables appertaining to the Nidadavole Estate pending the disposal of that suit. The order appointing the Receiver did not purport in any way to deal with the money deposited in the Bank of Madras to the credit of Original Suit No. 35 of 1895 in the Sub-Court of Masulipatam.

On January 9th, 1901, an application by the present 1st respondent of a similar character to that on which the order was made which is now before this Court was dismissed and the order dismissing this application was affirmed by the High Court. The progress of the litigation has been delayed by reason of the passing of the Impartible Estates Act, but as things stand at present the appeal in Original Suit No. 35 of 1895 will shortly be heard by this Court, while there seems no reason to doubt that Original Suit No. 44 of 1899 will be disposed of by the District Court of Godavari in the course of the next few weeks.

On August 8th, 1902, the 1st defendant in Original Suit No. 44 of 1899 (the 1st respondent now before this Court) made the application with which we are now concerned. The application was made to the District Court of Godavari in Original Suit No. 44 of 1899 and it asked that Court to order payment to the petitioner of one-third of the cash balance to the credit of the Medur Estate and also to direct the Receiver to pay to the petitioner one-third of the cash balance to the credit of the Medur and Nidadavole Estates. The District Judge declined to make any order on the

2nd prayer of the petition on the ground that there were practically no funds in the Receiver's hands out of which payment could be made. But he ordered the payment out of one-third of the money in Court subject to security being furnished. The 1st defendant in the suit in which the application was made (Original Suit No. 44 of 1899) did not appeal against so much of the order of the District Judge as declined to order the payment out of moneys in the hands of the Receiver appointed in that suit. The moneys which the District Judge ordered to be paid out of Court were moneys which had been paid into the Masulipatam Court to the credit of the Masulipatam suit under the order of the High Court, dated July 29th, 1898. I am of opinion that the District Judge had no jurisdiction to make this order. It is no doubt true that the plaintiff in Original Suit No. 44 of 1899 (the present appellant) is at the most, according to his own case, only entitled to one-third of the properties in question; that it is part of his case that the present 1st respondent is entitled to one-third of the properties, and that the parties to the two suits are the same. But this state of things does not give jurisdiction to the Godavari Court to deal with moneys which had been paid into another Court of co-ordinate jurisdiction, in another suit, under the orders of the High Court. The District Judge was of opinion that S. 502 of the Civil Procedure Code applied since the money was held on behalf of the parties to the two suits.

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The section runs as follows :—

“ When the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last named party, with or without security, subject to the further direction of the Court.”

On the true construction of the section it seems to me that it only applies when the party making the admission holds the property or other thing which the party in whose favour the order is made seeks to have delivered to him. But even adopting the construction for which Mr. Krishnaswami Aiyar contended, and assuming that the section was intended to apply to a case where the property

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is not held by the party making the admission, the section, in my opinion, would not cover a case where the money was held by another Court to the credit of another suit. The District Judge in paragraph 18 of his order directed that this one third share should be attached, and Mr. Krishnaswami Aiyar, so far as I could follow his argument upon the point, sought to support the order on the ground that the one-third share could be regarded as "attached" within the provisions of S. 272, Civil Procedure Code. In the first place the order is not, and does not purport to be, an order of attachment. There could be no attachment in Original Suit No. 44 of 1899 for the reason that there is, as yet, no decree in the suit. In the second place the section merely provides a special method of attachment in a case in which the Court ordering the attachment has jurisdiction to make the order. The words "subject to the further orders of the Court from which the notice issues" presuppose that it is competent for the Court to make the further orders referred to in the section. In my opinion it was not competent for the Godavari Court to make any order with reference to the moneys in the Sub-Court of Masulipatam standing to the credit of the Masulipatam suit. Where property is the subject of legal proceedings there is no doubt jurisdiction in certain circumstances to allow the payment of the income of the property to parties interested. In England this jurisdiction is recognized in R. S. C. Order 50, Rule 9, which reproduces the provisions of the old Chancery Procedure Act. I feel no doubt that at any rate a High Court in this country has jurisdiction to make an order *pendente lite* for the payment of moneys in the hands of a Receiver to one of the parties to a suit. For a case in which this jurisdiction was exercised, see *Motivahu v. Premivahu*¹. In the present case if a proper application were made in the proper Court an effective order as to the disposition of the fund in Court could be made. I am of opinion that there was no jurisdiction in the Godavari Court to make the order complained of, and I think it should be set aside.

BODDAM, J. :—I agree.

SUBRAHMANIA AIYAR, J. :—The facts of the case, which are all undisputed, having been fully set out in the judgment of the learned

1. I. L. R., 16 B. 511.

Chief Justice, I shall, without repeating them, proceed at once to consider the questions which in my opinion arise for determination. They are :—

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1. Whether the District Court had power to direct payment to the 1st respondent of the amount referred to in its order, notwithstanding that the money was not in the hands of either of the other parties to the litigation, the appellant or the 2nd respondent.
2. Whether, assuming the District Court had such power, it was precluded from directing the payment by the mere fact that the fund out of which the payment was to be made, was in the custody of another Court of co-ordinate jurisdiction (*viz.*, of the Sub-Court of Masulipatan), without any reference whatever to the circumstances of the litigation in connection with which the money came into the custody of that Court and to the rights possessed by the parties in that fund.
3. And lastly whether, if the order of the District Judge is not open to question on either of the above grounds, it was rightly passed on the merits.

Now the first question depends on the construction of S. 502 of the Civil Procedure Code which runs thus :—"When the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last named party, with or without security, subject to the further direction of the Court."

I can see no warrant at all either in the language or the reason of this provision, to confine its operation only to cases where the money or the thing capable of delivery is actually held by a party to the suit. If the intention of the legislature was so to confine it, it was of course the easiest thing to have made that intention clear. For instance that could have been done by inserting after the words 'capable of delivery' the short clause "and is held by a party to the suit" and substituting for the

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words "any party thereto" immediately following, the words "such party." To adopt the construction suggested on behalf of the appellant is to import into the section the material words suggested above or something to that effect. It cannot be said that the introduction of such material words is necessary to avoid any absurdity or incongruity or the like, which would result from the adoption of the strictly grammatical construction of the section. No liberty being taken with the language of the section, it follows that the order contemplated by the section can be passed whether the money or other thing is in the hands of a party to the litigation or not, so long of course as such order is enforceable without infringing the rights of a person not a party to the suit.

There is nothing in the reason of the provision which should make us hesitate to accept this conclusion as the right one. In fact all considerations on that score will, I think, be found to point in its favour. As might have been expected, the learned pleaders for the appellant did not shrink from urging that under the law of this country a Court has no power prior to decree to make any such order as is contemplated by S. 502, Civil Procedure Code, in respect of property in its own hands, even though the conditions as to the property being the subject-matter of the suit and the admissions as to the title thereto were present. As to whether such an order could be passed in virtue of any inherent authority in the Court, it may be observed that no power of the kind is claimed in respect of property in the hands of a party. It has to be borne in mind that there is an essential distinction between a Court's inherent power and its jurisdiction. I am not aware of any authority which supports the view that the inherent power of a Court could be invoked except for the limited purpose of preserving and enforcing order, securing efficiency and preventing abuse of process in the exercise of a jurisdiction which the Court otherwise possesses. This being so, unless S. 502, Civil Procedure Code, is held applicable to such a case, it would follow that the legislature, while taking the trouble to enable a Court to pass orders as to property in the hands of a party, in the circumstances contemplated by the section, has left unprovided the case of property otherwise similarly circumstanced, because of the more advantageous fact that it is in its own hands. I, therefore, unhesitatingly come to the conclusion

that the restricted construction sought to be put upon the section is untenable and that the District Court had power to direct the payment, notwithstanding that the money was not held by any of the parties to the suit, provided that the order was otherwise sustainable.

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Passing to the next question, it is to be observed that the contention as to this on behalf of the appellant rests on the extraordinary assumption that once property in litigation passes into the custody of a Court, such custody becomes somehow completely disconnected with the matters in litigation and the rights of the parties concerned—that it has a magic about it which would preclude any other tribunal having jurisdiction over other litigation in respect of the same property and entitled by its adjudication to bind the parties litigating in the Court having custody, from passing any order affecting the property even though the execution of, or the giving effect to, such order in no way conflicts with any decrees or orders passed or to be passed by the Court having the custody. The very statement of this assumption is to my mind sufficient to expose its fallacious character. No cases were cited in the argument throwing light on the point and apparently the question is new to this country. So far as I am aware there is little English authority bearing on the point and this is possibly because the conditions of judicature in England have scarcely admitted of any such question of conflict arising. If, however, we turn to the United States, such questions, owing to the existence side by side of Federal and State Courts, have arisen not infrequently and a number of cases are to be found in the reports of the tribunals of that country, dealing, with sufficient fulness and clearness, with the main principles applicable to the matter and the working thereof in actual practice. It is, however, enough for the present purpose to refer to a few of them.

*Buck v. Colbath*¹ decided by the Supreme Court of the United States in 1865, seems to be a leading authority. There the facts were these. Buck, a Marshal of the United States, having in his hands a writ of attachment against certain parties, levied the same upon certain goods. Colbath who was not among these parties brought an action of trespass in a State Court against Buck for

1. Wallace, p. 334.

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taking the goods. At the trial, Colbath proved his ownership and Buck relied solely on the fact that he was Marshal and held the goods under the writ. The defence of the Marshal was held unsustainable.

Though so far as the facts go, the present case is different, yet as the law relating to the matter under consideration is elaborately expounded in the judgment, and as some dicta in an earlier decision of the same tribunal connected with the matter and likely to give rise to misapprehension are explained, it may be well, notwithstanding their length, to extract the following passages :—

“ It must be confessed that this decision (*Freeman v. Howe*¹) took the profession generally by surprise overruling as it did the unanimous opinion of the Supreme Court of Massachusetts as well as the opinion of Chancellor Kent in his Commentaries (Vol. I., 410). We are however entirely satisfied with it and with the principle upon which it is founded, a principle which is essential to the dignity and just authority of every Court and to the comity which should regulate the relations between all Courts of concurrent jurisdiction. That principle is that whenever property has been seized by an officer of the Court by virtue of its process, the property is to be considered as in the custody of the Court and under its control for the time being, and that no other Court has a right to interfere with that possession unless it be some Court which may have a direct supervisory control over the Court whose process has first taken possession, or some superior jurisdiction in the premises. * * * * * A departure from this rule would lead to the utmost confusion and to endless strife between Courts of concurrent jurisdiction. * * * * *

“ This principle, however, has its limitations ; or rather its just definition is to be attended. It is only while the property is in the possession of the Court either actually or constructively that the Court is bound or professes to, protect that possession from the process of other Courts. Whenever the litigation is ended or the possession of the officer or Court is discharged, other Courts are at liberty to deal with it according to the rights of the parties before them whether these rights require them to take possession of the

1. 24 Howard, 450.

property or not. The effect to be given in such cases to adjudications of the Court first possessed of the property depends upon principles familiar to the law ; but no contest arises about the mere possession and no conflict but such as may be decided without unseemly and discreditable collisions. * * * * "It is obvious that the action of trespass against the Marshal in the case before us does not interfere with the principle thus laid down and limited. The Federal Court could proceed to render its judgment in the attachment suit, could sell and deliver the property attached and have its execution satisfied without any disturbance of its proceedings or any contempt of its process. While at the same time, the State Court could proceed to determine the questions before it involved in the suit against the Marshal without interfering with the possession of the property in dispute. * * * * *

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"Seizing upon some remarks in the opinion of the Court in the case of *Freeman v. Howe* not necessary to the decision of that case, to the effect that the Court first obtaining jurisdiction of a cause has a right to decide every issue arising in the progress of the cause and that the Federal Court could not permit the State Court to withdraw from the former the decision of such issues, the counsel for the plaintiff in error insists that the present case comes within the principle of those remarks.

"It is scarcely necessary to observe that the rule announced is one which has often been held by this and other Courts, and which is essential to the correct administration of justice in all countries where there is more than one Court having jurisdiction of the same matter. At the same time it is to be remarked that it is confined in its operation to the parties before the Court or who may, if they wish to do so, come before the Court and have a hearing on the issue so to be decided. * * But it is not true that a Court having obtained jurisdiction of a subject-matter of a suit and of parties before it thereby excludes all other Courts from the right to adjudicate upon other matters having a very close connection with those before the first Court, and in some instances requiring the decision of the same questions exactly.

"In examining into the exclusive character of the jurisdiction of such Courts, we must have regard to the nature, remedies, the

1. 24 Howard. 450.

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character of the relief sought and the identity of the parties in the different suits. For example, a party having notes secured by a mortgage on real estate, may, unless restrained by statute, sue in a Court of Chancery to foreclose his mortgage, and in a Court of law to recover a judgment on the notes and in another Court of law in an action of ejectment to get possession of the land. Here in all the suits the only question at issue may be the existence of the debt mentioned in the notes and mortgage; but as the relief sought is different and the mode of proceeding is different, the jurisdiction of neither Court is affected by the proceeding in the other. And this is true notwithstanding the common object of all suits may be the collection of the debt. The true effect of the rule in these cases is, that the Court of Chancery cannot render a judgment for the debt, nor judgment of ejectment but can only proceed in the own mode, to foreclose the equity of redemption by sale or otherwise. The first Court of law cannot foreclose or give judgment of ejectment, but can render a judgment for the payment of the debt; and the third Court can give the relief by ejectment but neither of the others. And the judgment of each Court in the matter properly before it is binding and conclusive on all other Courts. This is the illustration of the rule when the parties are the same in all three of the Courts.

“The limitation of the rule must be much stronger and must be applicable under many more varying circumstances when persons not parties to the first proceeding are prosecuting their own separate interests in other Courts.

“The case before us is an apt illustration of these remarks. The proceeding in the attachment suit did not involve the title of Colbath to the property attached. The whole proceeding in that Court ending as it might in a judgment for the plaintiff, an execution and sale of the property attached and satisfaction thereby of the plaintiff's debt, may be and in such cases usually is carried through without once requiring the Court to consider the question of title to the property. That is all the time a question between the officer or the purchaser at his sale, on the one side, and the adverse claimant on the other. There is no pretence, nor does any one understand that anything more is involved or concluded by such proceedings, than such title to the property as the defendant in attachment had, when the levy was made.

“Hence it is obvious that plaintiff in error is mistaken when he asserts that the suit in the Federal Court drew to it the question of title to the property and that the suit in the State Court against the Marshal could not withdraw that issue from the former Court.”

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Reference may next be made to the decision of the Supreme Court of Illinois in *Plume and Atwood Manufacturing Co. v. Caldwell* which strikingly brings out the necessarily intimate connection which exists between the custody of property by a Court and the rights of the parties concerned, and further shows that their acts pending such custody may enable another Court to pass decisions touching the property, in short, transfers jurisdiction over the property to that Court. The facts briefly were :—

A corporation in Chicago had become insolvent. Writs of attachment had been issued at the instance of certain creditors of the corporation by a Circuit Court of the United States and property seized by the Sheriff thereunder. A voluntary assignment in favour of the creditors was then made and an assignee appointed. When the assignee sought to reduce the assigned property to possession he found it in the hands of the Sheriff who claimed the right to hold the same subject only to the order of the Court which issued the writs. However, the creditors at whose instance the writs had been issued and the seizure made gave their consent to an order by the County Court upon the Sheriff to pass possession to the assignee subject to the lien, if any, in their favour arising by reason of the seizure. It was held that the property passed from the jurisdiction of the Circuit Court which made the seizure and had the custody to the County Court which had jurisdiction over the assignment for the benefit of creditors, on the simple principle that the jurisdiction of the former Court was one that could be waived by the party. The contention raised and the reasons for its being overruled were thus stated :—

“Appellants deny the jurisdiction of the County Court to pass judgment upon the validity of the liens created by the levy of their attachments. They insist that the Circuit Court alone had jurisdiction over the attached property and could alone ascertain and declare their rights in respect of the same. This point

1. 29 American State Reports, p. 305 ; 136 Illinois, 163

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may be conceded if the parties in interest had not by consent invested the assignee with the possession of the attached property and thus clothed the County Court with exclusive jurisdiction in respect thereof and in respect of all claims thereon. The only defect in the jurisdiction of the County Court was the want of possession by the assignee and when that defect was supplied by the voluntary consent of appellants that the property should pass to the assignee, subject to their claims. the County Court was clothed with full authority to settle all conflicting claims, including questions of priority that might arise in respect of such property. It was entirely competent for the parties to consent, as they did, to the order of the County Court directing the Sheriff to turn over possession of the property to the assignee. The rule giving exclusive jurisdiction to the Court first acquiring it is one that parties may waive; and by consent the jurisdiction of the Circuit Court was here waived and the property passed into the hands of the assignee to be disposed of under the direction of the County Court, to all intents and purposes as if the assignee had acquired possession prior to the levy, but subject to the lien created by such writs. It is true that the consent of the appellants for the transfer of possession from the Sheriff to the assignee who is trustee for all the creditors as well as for the debtor corporation, was upon the condition that such transfer should be subject to all priorities, liens and rights that might have been acquired by the levy of such attachment. The right of all parties to the attached property, was to remain *in statu quo*. If appellants by their attachments had acquired valid liens, such liens were to remain unaffected by the order on the Sheriff to surrender possession to the assignee. This determined no right in the creditors, but left such rights for future adjudication by the Court having jurisdiction of the insolvent's property. If the bank appellant had a prior lien by the levy of its execution, it was to continue a lien until the debt was paid. If, on the other hand, execution was obtained by fraud, or was preferential, then it would be set aside. And the same is true in respect of the attachments. These and all other questions by the voluntary surrender of the property to the assignee, were submitted to the judgment of the County Court."

The case of *Spiller v. Wells*¹ decided in 1899 by the Supreme Court of Virginia may be next noticed. The following passage at p. 880 of the American State Reports in the judgment is all that is material here :—

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“The rule established is necessary to the orderly and decent administration of Justice. Nothing can be more unseemly than a struggle for jurisdiction between Courts ; but a rule which rests for its support upon considerations of convenience however great, and of decency, order and priority however exacting must yield to the higher principle which accords to every citizen his right to have a hearing before some Court.”

This extract shows that the jurisdiction arising from custody of property by a Court cannot bar the trial of a question relating to the property in another Court if such trial cannot be had in the Court having the custody.

The case of *Gay Hardie and Company v. Brierfield Coal and Iron Company*,² decided by the Supreme Court of Alabama in 1891, though not a case of property in the custody of a Court, furnishes a clear illustration of the statement just made, for there it was held that though the trustee of a mortgage bond of an insolvent corporation had procured in a Circuit Court of the United States a decree for foreclosure and sale of property, the simple contract creditors of the corporation were at liberty to maintain a bill in a State Court to have the issue of the mortgage bonds and the decree for foreclosure in the Circuit Court declared fraudulent and void as to them. It was laid down that the right to maintain the bill rested not merely on the ground that the subject-matter of the second suit was not the same as that of the first, but also on the ground that the simple contract creditors suing in the State Court were without adequate means of asserting their claims in the foreclosure suit in the Circuit Court, since they were unable to make themselves parties thereto without the consent of the complainant therein, and did not occupy that relation to the matter or the parties in the suit which would enable them to file a bill of review of the decree and show error apparent on the record.

1. 70 American State Report, p. 878 ; 96 Virginia, 588.

2. 33 American State Reports, p. 122 ; 94 Alabama, 303.

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The ground for the decision was thus put by the Court (see p. 136 of the American State Reports) :—

“ All authorities recognize the importance of carefully preserving the boundary line between Courts of concurrent jurisdiction in order to prevent conflicts and to preserve in harmony their relations to each other.* * * To prevent abuse of the principle, and the successful perpetration of injustice or fraud through the forms of law, Courts accord to suitors and litigants all necessary latitude ; and they are not restricted to any one forum or the adjudication of any question or right, provided only that such adjudications are not upon questions pending in another Court which had prior jurisdiction and provided that its writs or process shall not hinder the performance of any lawful mandate of such concurrent Court or interfere with or disturb the possession of any subject-matter then *in gremio legis*”.

From the above authorities and others which I refrain from quoting lest this judgment might be unduly encumbered, for instance, cases of seizure by a State Court of property subsequently litigated in Federal Courts on the ground of Maritime liens thereon, over which class of litigation Federal Courts alone have jurisdiction, as to which *Moran v. Sturges*,¹ and the cases cited therein may be consulted, the following propositions would be seen to be clearly deducible :—

- (I). That the custody by a Court of property belonging to litigants does not give the Court any arbitrary power over it,
- (II). that though such custody could not be interfered with directly by the orders of another Court, yet this is but a rule of comity intended solely to avoid unseemly collisions in the execution of process of different authorities,
- (III). that the rule in question is not a rigid and inflexible one but is capable of adaptation to circumstances and could never be worked so as to defeat or obstruct the doing of justice in due

1. 154 United States Reports, p. 256.

course and consequently in no way interferes with the power of a Court other than that having custody to pass orders touching the property where it has jurisdiction to pass the orders and bind the parties in connection with whose litigation the custody of the other Court began, and

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- (IV). that it is therefore incumbent on the Court having the custody, on due application being made to it, to give effect to such an order in so far as it is not inconsistent with the performance of its own duties respecting the property in the litigation before itself.

It is obvious that there is nothing in the rules thus deduced, that is peculiar to any particular country and that they rest on a policy necessarily applicable to every system of judicature presenting similar conditions. Indeed S. 272 of the Code of Civil Procedure on which Mr. Krishnaswami Aiyar relied, not—as I understood him—as directly governing the present case, but only as supporting his argument by analogy, contains a distinct recognition of the principles referred to in so far as execution of decrees passed by one Court, by attachment of property in the custody of another Court, is concerned.

I ought perhaps to add that no argument against the soundness of the conclusions come to by me can be derived from the absence of an express provision in the Code pointing out how effect is to be given to an order passed under S. 502, Civil Procedure Code, in respect of property in the custody of another Court. But likewise the Code contains no direction as to how a *decree* by one Court in respect of property in the custody of another Court, is to be carried out. Of course on the transmission of the decree to the Court having the property, that Court under S. 228 of the Civil Procedure Code should direct the property to be dealt with according to the decree. And this would be so, not because of any express direction in the Code in respect of the specific case, but because that would necessarily be the course to be adopted had the property been in the custody of the very Court which passed the decree. It follows, therefore, that in a case like the present it would

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be the duty of the Court having the property to direct payment in accordance with the order so far as such payment would in no way derogate from anything to be done by itself, on due application being made to it. Whether the application is to take the shape of a requisition by the Court itself or that of a petition by the party interested, is a mere matter of form which in no way affects the competency of the Court to pass the order or the validity thereof otherwise. The general principles applicable to the subject being apprehended to be as stated above, I shall proceed to consider the case with reference to the circumstances of the respective litigations in the two Courts.

First as to the litigation in Masulipatam, the original plaintiff, the Medur Rane, claimed that she was entitled to the money among other properties as her deceased son's heir. This was denied by the defendant Papamma Row who herself claimed the property as adoptive mother and heir of the deceased. The suit was dismissed. Appeals have been preferred to this Court in which the present appellant is contesting the respondents' claim in the right relied on by Papamma Row. The appeals have not been decided by this Court and there is no decree touching the property in question to be executed. In this state of matters Papamma Row's successors, no doubt, may, subject to any order of the Appellate Court in the matter, ask the Masulipatam Court to direct payment of the money in its custody to themselves. But such an application is, in the circumstances, impossible for the two others entitled on the appellant's showing as Papamma Row's successors are the respondents themselves, who deny his right to participate in the fund and base their case on a footing inconsistent with Papamma Row's alleged right itself, viz., that of the Medur Rane's alleged right. Now looking from the point of view of those claiming under the Medur Rane, it is clear they could not obtain any relief, interlocutory or otherwise, unless they succeeded in the appeals; and supposing they do, no order to be passed in pursuance of the appellate decree in such event, can really conflict with the present order directing payment of a third of the money in the custody of the Court to the first respondent, since the party entitled to the benefit of both the orders is one and the same person, viz., the first respondent himself, who would then be entitled to even more than a third, viz., a half.

Obviously therefore in no view of the possible termination of the Masulipatam litigation can it be said that the order of the Godavari Court would in any way trench upon any orders to be passed by the Masulipatam Court in respect of the money.

Turning to the Godavari litigation it should be remarked that the appellant's claim to a share in the moneys is only as one of the successors of Papamma Row. That no question between him and the respondents on the footing on which this suit of the appellant rests, could have been or could be litigated in the Masulipatam Court is patent; for there the Court was called upon simply to decide whether the Medur Ranees' claim or Papamma Row's claim was well founded. If the former be upheld by the ultimate decree in that case, that would exclude the appellant from any participation in the money, on the very hypothesis on which his case in both the Courts rests. If, on the other hand, Papamma Row's claim be upheld that would result in the confirmation of the decree dismissing the suit and the Court could not go into any dispute arising between those entitled to take as Papamma Row's successors *inter se*. Hence the inclusion by the appellant himself of the fund in the custody of the Masulipatam Court, among the properties in litigation in the Godavari Court and the claim for the division thereof. The appellant having thus made the fund a subject of the suit and having had all along to admit the 1st respondent's right therein to the extent of a third at least, it is impossible to see how it can lie in his mouth to question by any reference to the Masulipatam litigation the power of the Godavari Court to pass orders respecting it.

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This being so, the order of the District Judge, taking S. 502, Civil Procedure Code, to be applicable to the case, cannot but bind the appellant and the other parties to the litigation and preclude any of them from contending to the contrary before the Masulipatam Court in any proceeding coming before it between these parties; and the Masulipatam Court must give effect to it since, as already shown, no real conflict can in consequence arise between the process of the two Courts in the matter.

Lastly, as to the merits, they are all in favour of the 1st respondent. It was said on behalf of the appellant that the appeals to this Court in the Masulipatam suit as well as the original suit in the Godavari Court are likely to be disposed of ere long. But the disposal of those matters cannot bring the object

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proposed to be effectuated by this order within measurable distance of its being otherwise accomplished. It is impossible to say what the result will be in the appeals to this Court or in the suit in the Godavari Court and when, if at all, a final decree in favour of the 1st respondent will be passed, seeing that the class of litigants before us, disputing about valuable Zemindaris, almost think that it is beneath their dignity to be content with any but a decision of His Majesty in Council. Moreover the passing of the Impartible Estates Act which tied the hands of the parties for more than a year is an incident sufficient to show the peculiar vicissitudes to which litigation in this country is subject. Though it is some year, since the litigation between the parties began, the 1st respondent admitted on all hands to be entitled to a third, has been unable to get a single rupee yet, out of the large accumulated fund in the Masulipatam Court or out of that in the Godavari Court, and he is similarly kept out of the enjoyment of even his admitted share of the income accruing from time to time out of the Zemindaris, the annual net rent of which alone is over two lakhs of rupees. It is not surprising therefore that he has been unable to meet the demands of his creditors and is threatened with litigation and loss. The appellant, on the other hand, has failed to show by anything tangible that his interests would suffer by the 1st respondent's application being granted. It seems therefore to me that the District Court exercised a very proper discretion in making the present order which it safeguarded by the reservation of funds required to meet all contingencies and by requiring security.

It remains only to add that the mention of attachment in the Judge's order should be taken to have reference to what is to be done on the receipt of the money. I understand the District Court to say that in order to give effect to its intentions it would treat the money when received as in its hands for the satisfaction of the 1st respondent's creditors and would make payment accordingly from time to time.

I would therefore dismiss the appeal with costs.

THE CHIEF JUSTICE :—In accordance with the decision of the majority of the Court, the order of the District Judge will be set aside.

The 1st respondent must pay the costs of the appellant and of the 2nd respondent here and in the Court below.

NOTES OF RECENT CASES.

Subrahmanya Aiyar J.

Davies J.

Benson J.

1902, Dec. 15.

} *Cr. R. P. 454 of 1902.*

Criminal Procedure Code, S. 528, Cl. 4—Head of a village under Reg. IV of 1821—Power of Transfer—Case of abusive language pending before the head of a village.

The accused was charged with using abusive language before the “head of a village”. An application for transfer of this case from his file was made to the Deputy Magistrate and the Deputy Magistrate transferred the case from the file of the village Magistrate to that of the Sub-Magistrate.

A revision petition was filed by the complainant to the High Court. The *Chief Justice* and Mr. Justice *Bhashyam Iyengar* before whom the case first came on for hearing differed as to the power to any magistrate to transfer a case like this from the file of the village Magistrate. The Chief Justice held that in Cl. 4 of section 528 the words “head of a village under Madras Reg. IV of 1821” had the effect of incorporating section 10 of Reg. XI of 1816. Mr. Justice *Bhashyam Iyengar* held that the phrase meant “head of a village acting under Reg. IV of 1821” and that the power of transfer was restricted only to cases of petty thefts which is the offence cognizable by heads of villages under Reg. IV of 1821. Owing to this difference of opinion their Lordships referred the case to a Full Bench.

Held, concurring in the opinion of *Bhashyam Iyengar, J.*, that the power of transfer conferred by Cl. 4 of section 528 is only with regard to cases of theft and that the phrase should be read as “the head of a village acting under Reg. IV of 1821.”

V. Krishnaswami Aiyar for complainant.

V. C. Desikachariar for accused.

Subrahmanya Aiyar J.
 Bhashyam Aiyangar J. } S. A. 982 of 1901.
 1903, Jan. 19.

Suit for specific performance—Agreement to sell lands—No alternative claim for the return of purchase money—Pleadings.

Plaintiff sued for specific performance of an agreement by defendant to sell certain lands in consideration of Rs. 100 alleged to have been paid by plaintiff to defendant. The Munsif found that the agreement as well as the payment were true and decreed specific performance. The Sub-Judge on appeal reversed the Munsif's decree on the ground that though the payment was true, the agreement before it was complete fell through and that consequently there was no agreement to be specifically enforced.

In second appeal it was urged by the plaintiff-appellant that a decree should have been given in his favour at least for the return of the money paid by him.

Held that in the absence of an alternative claim in the plaint for the return of the purchase money no decree for the same could be passed.

M. R. Ramakrishna Aiyar for appellant.

V. C. Seshachariar for respondent.

Subrahmanya Aiyar J.
 Bhashyam Aiyangar J. } S. A. 1358 of 1901.
 1903, Jan. 19.

Claim based on exclusive title—Decree on the footing of joint title—Validity of.

Where the plaintiff claimed exclusive possession of a tank as sole owner and a decree for joint possession was given on the finding that plaintiff and 1st defendant were joint owners of the tank and objection was taken to the decree on the ground that the claim in the plaint was not based on joint title.

Held that no valid objection could be taken to the decree.

C. V. Anantakrishnu Aiyar for appellant.

A. Nilakanta Aiyar for respondent.

Benson J.
Bhashyam Aiyangar J. } *C. M. S. A. 35 of 1902.*
 1903, Jan. 20.

Civil Procedure Code, Ss. 232, 244—Appeal from order under S. 232.

An application for execution under section 232 was put in before the District Munsif by the assignee of the decree. The decree sought to be executed was one passed in appeal by the Sub-Judge reversing the decree of the District Munsif. The Munsif dismissed the application, holding that the proper court to apply to is the Sub-Court. On appeal against the order of the Munsif the Sub-Judge reversed it and remanded the case to be dealt with according to law. A review petition was subsequently put in by the judgment-debtor before the Sub-Judge on the ground that no appeal lay to him from the Munsif's order under S. 232. The Sub-Judge granted the review and dismissed the original appeal to him on the ground that no appeal lay. Hence this second appeal.

Held that an order passed under section 232 for the purposes of appeal falls within the purview of the last clause of section 244 and therefore an appeal lay.

I. L. R., 25 M. 545 followed.

V. Ramesam for appellant.

P. Nagabhushanam for respondent.

Benson J.
Bhashyam Aiyangar J. } *C. R. P. 87 of 1902.*
 1903, Jan. 20.

Civil Procedure Code, S. 315—Sale proceeds rateably distributed between decree-holders—Suit by third party impleading only some decree-holders—Adjudication that judgment-debtor had no saleable interest—Purchaser's subsequent suit for refund of purchase money against a decree-holder who was no party to the suit.

Defendant is the petitioner. He was one of the decree-holders among whom the sale proceeds of the property purchased in court auction by the plaintiff were distributed. Subsequent to the sale and distribution a claimant brought a suit impleading the plaintiff,

purchaser, and the decree-holders who brought the property to sale but without making the other decree-holders of the judgment-debtor including this defendant parties. It was *found* in that suit that the judgment-debtor had no saleable interest in the property. The plaintiff-purchaser was consequently deprived of the property and hence this suit by him against the petitioner for the sum realized by him. The lower Court was of opinion that the adjudication in the former suit between the claimant and other decree-holders is binding upon the defendant in the absence of fraud and granted a decree for plaintiff. Hence the revision petition.

Their Lordships held following 16 M. 361 that the former judgment is no legal evidence against the petitioner to prove that the judgment-debtor had no saleable interest in the lands sold inasmuch as the petitioner was no party to the original suit and remanded the case for disposal after allowing the parties to adduce evidence on the point.

J. I. Rosario for petitioner.

V. Ryrū Nambiyar for respondent.

<i>Benson J.</i> <i>Bhaskhyam Aiyangar J.</i> 1903, Jan. 21.	}	<i>C. M. S. A. 37 of 1902.</i>
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Foreclosure decrees—Final decree—Application within one year—Notice not necessary.

Where after the expiration of the time fixed for redemption in a foreclosure decree which was subsequently not extended, and after one year from the date of decree the decree-holder applied for a final decree for foreclosure and an order absolute and for delivery of possession was passed but without notice to the judgment-debtor,

Held, that no notice was necessary and that the order was perfectly valid.

I. L. R., 22 M. 133 not followed.

I. L. R., 25 M. 244 followed.

K. Narayana Rao for appellant.

A. Srinivasa Poi for respondent.

Benson J.
Bhashyam Aiyangar J. } S. A. 980 of 1901.
 1903, Jan. 21.

*Landlord and Tenant—Assertion of permanent occupancy right
 —No denial of title—No forfeiture of right to notice before
 ejectment.*

An assertion by a tenant that he has permanent occupancy rights and that the landlord has no right to lease the lands to a third party is no denial of the landlord's title and will not deprive the tenant of his right to notice before ejectment.

V. C. Seshachariar for appellant.

K. Ramachandra Aiyar for respondent.

Benson J.
Bhashyam Aiyangar J. } S. A. 1152 of 1901.
 1903, Jan. 21.

Limitation Act, Art. 120 and 131—Suit for declaration.

The suit is for declaration of the plaintiff's right to receive annually the tasdik allowance payable by Government for the conduct of a certain religious institution and also of the plaintiff's right to receive the arrears due for 8 years prior to suit now in the hands of Government. The defendants were the trustees of an adjoining temple who contended that they were entitled to receive it directly from Government though they conceded that they would be bound to hand over the same to the plaintiffs. The right of the plaintiffs to receive the allowance direct was denied in 1887 and the suit was brought in 1899. It was contended that Art. 120 applied and not Art. 131, and the suit is therefore barred.

Held, that Art. 120 applied and that the suit for a general declaration of the plaintiff's right was barred.

That the right to receive the yearly allowance accrued from year to year and therefore the right to receive the arrears due for 6 years before suit was not barred.

{ *S. A. Nilakanta Aiyar* for appellant.

T. V. Seshagiri Aiyar for respondent.

Benson J.
 Bhashyam Aiyangar J. } C. M. P. No. 987 of 1901.
 1903, Jan. 29.

Legal Practitioners' Act, Ss. 17, 37—Revision under Charter Act, S. 15 and under S. 622, C. P. C.—C. P. C., Ss. 194, 195, 647—Declaration as law tout—Competency of judge to act on affidavit only—Criminal Courts of the district not subordinate to District Judge.

Certain Vakils in Madura moved the District Judge to declare certain persons touts. The District Judge required the Vakils' affidavits and one Vakil filed an affidavit to the effect that three particular persons were touts, and another Vakil filed another affidavit implicating four people of whom two only were the persons implicated in the other affidavit. The District Judge acting on the strength of these affidavits declared all the persons touts and prohibited their entering the precincts of all the criminal courts of the district.

Objection was taken in revision that the District Judge erred in law in acting upon mere affidavits, that Ss. 194 and 195, C. P. C., did not apply to the case and that the order of the District Judge so far as the criminal courts of the district was concerned was *ultra vires*.

Their Lordships interfered in revision under S. 622, C. P. C., and held that the District Judge was competent to act on the strength of the affidavits only and that Ss. 194, 195 and 647, C. P. C. applied to the case.

*Also :—*That the order of the District Judge in so far as it concerned the criminal courts of the district was bad for want of jurisdiction, the criminal courts of the district not being subordinate to the District Judge.

C. Krishnan for petitioner.

Davies J.
 Bhashyam Aiyangar J. } S. A. No. 1401 of 1901.
 1902, Dec. 19.

Hindu Law—Father's obligation to marry daughter.

A Hindu father is not legally bound to celebrate the marriage

of his daughter and the mother is therefore not entitled to sue to recover expenses incurred by her in celebrating the marriage.

K. R. Subramania Sastri for appellant.

A. S. Balasubramania Aiyar for respondent.

Subrahmania Aiyar J.

Davies J.

Benson, J.

1902, Dec. 23.

} *Appeals Nos. 187 and 188.*

Revenue—Joint patta—Payment of revenue by one pattadar—Contribution—Charge.

On a difference of opinion between Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore, held by the full Bench agreeing with Mr. Justice Bhashyam Aiyangar that a co-sharer who claims contribution in respect of the payment of a common revenue demand would be entitled to a charge on the lands of his co-sharers.

T. Rangachariar for appellant.

Advocate-General for respondent.

Chief Justice,
Subrahmania Aiyar J.

Davies J.

1903, Feb. 5.

} *O. S. A. No. 20 of 1902.*

Insolvency—Attachment in execution before property vested in Official Assignee—Charge—Right to proceed in execution.

Attachment in execution of a decree does not operate to create a charge so as to prevent the vesting of the property in the Official Assignee.

C. V. Anantakrishna Aiyar for appellant.

A. Daly for respondent.

Chief Justice,
Subrahmania Aiyar, J.

1903, Jan. 28.

} *S. A. Nos. 932, 933 of 1901.*

Sub-mortgagee, rights of—Mortgagee's suit for sale—Money realised—Attachment by decree-holders—Payment—Sub-mortgagee's right to follow money.

Though a sub-mortgagee may bring a suit for sale, yet when the mortgagee sues for sale and the money is realised and brought into court, the sub-mortgagee cannot claim to have a charge over the specific coins in court.

If therefore the decree-holders of the mortgagee attach the money in court and get paid, the sub-mortgagee cannot compel them to refund any portion of the money so paid to them.

A. Nilakantu Aiyar for appellant.

K. Ramachandraiya and *L. Narayanaiya*, for respondents.

Benson J.
Bhashyam Aiyangar J. } *S. A. No. 929 of 1901.*
 1902, Nov. 21.

Civil Procedure Code, S. 294—Person interested—Hindu son who was no party to suit—Confirmation of possession—Application by judgment-debtor's son to cancel sale—Cancellation of sale—Bona fide purchaser—Cancellation a nullity.

Where in execution of a decree against a Hindu father family properties are sold, the son who is not a party to the suit is not a person "interested in the sale" within the meaning of S. 294, C. P. C. and cannot apply to have the sale cancelled.

No application to set aside a sale can be entertained after a sale has once been confirmed.

A sale in execution cannot be set aside against a *bona fide* purchaser for value from the execution purchaser at any rate after the confirmation of sale.

An order setting aside a sale after confirmation at the instance of the son of the judgment-debtor who was no party to the suit is passed without any jurisdiction and is a nullity.

In execution of a decree for sale against a Hindu father properties were sold. After confirmation the son applied under S. 294 to have the sale set aside on the ground that the properties had been purchased by the decree-holder himself without leave of court in the name of the 2nd defendant in the present suit. At the time of the application the 2nd defendant had sold the properties to the third defendant and put them in his possession. The third defend-

ant resisted the application, but the courts set aside the sale without hearing his objections saying that he had no *locus standi* in that application. When however properties were sought to be taken back in execution, the court referred the judgment-debtor to a regular suit as the sale had already been confirmed. In the present suit to recover the properties on the strength of the order cancelling the sale:—

Held that as the courts below had held that the judgment-debt was such as to bind the son the sale was good, and that the proceedings taken by the son to set aside the sale and the order setting it aside were invalid and ineffectual.

P. S. Sivaswami Aiyar for appellant.

Benson J.
Bhashyam Aiyangar J. } *Appeal No. 67 of 1901.*
 1902, Dec. 3.

Rent Recovery Act, S. 10—Decree for acceptance of patta—Ejectment—Reversal of decree—Restitution—Regular Suit.

The revenue court directed the tenant to accept a patta tendered by the landlord. The tenant did not accept the patta within ten days. He was ejected by the court under S. 10 of the Rent Act. On appeal against the decree directing the acceptance of patta, the District Judge reversed the decree and remanded the case. The revenue court and the District Court finally affirmed the original decree. In a suit by the tenant to recover the land from which he was ejected:—

Held that on the reversal of the decree and remand the order of ejectment was also set aside in law and the tenant became entitled to be reinstated in possession and that such claim to restitution could be decreed in a regular suit.

P. S. Sivaswami Aiyar for appellant.

T. V. Seshagiri Aiyar for respondent.

Subrahmaniam Aiyar J.

Davies J.

Benson J.

1902, Dec. 11.

} *Cr. R. P. No. 78 of 1902.*

*Cultivating tenant—Cutting and carrying away crops—
Theft—Dishonest concealment.*

A tenant who has raised crops on his land is the owner in possession of such crop and cannot be guilty of theft in cutting and carrying off such crops without giving the melwaramdar his share of the produce. But he may be liable under S. 424, I. P. C., if the crops were dishonestly removed with the object of defeating the landlord's claim.

T. Rangachariar for the petitioner.

Public Prosecutor for the Crown.

Benson J.

Bhashyam Aiyangar J.

1903, Jan. 20.

} *C. M. S. A. No. 23 of 1902.*

Decree—Attachment—Execution by decree-holder after attachment—Legality of application—Subsequent application by attaching decree-holder.

The attachment of a decree does not prevent the decree-holder from applying for execution of the decree, though the court may stop further proceedings in execution under S. 278, C. P. C.

Such application is a legal application and will furnish a fresh starting point of limitation under Art. 179 of the Limitation Act. An application for execution by the attaching decree-holder if made within three years of the application by the original decree-holder will be in time.

K. Narayana Row for appellant.

K. Ramachandra Aiyar for respondent.

~~EXHIBIT~~

RECENT CASES.

Chief Justice,
Subramania Aiyar J.
Davies J.
1903, Jan. 22.

} C. R. P. No. 32 of 1902.

Provincial Small Cause Courts Act Ss. 16, 32—Investment of jurisdiction to try Small Causes up to Rs. 200—Retrospective operation.

Jurisdiction to try small causes up to Rs. 200 conferred on a District Munsif does not operate retrospectively so as to draw away from the regular side of the court cases rightly instituted on that side but which may have to be instituted on the small cause side, in case they are instituted after the investment of such jurisdiction.

P. Nagabhushanam for petitioner.

K. Subramania Sastri for respondent.

Chief Justice.
Subrahmania Aiyar J.
1900, Feb. 2.

} S. A. No. 1215 of 1900.

Suit upon one mortgage—Mortgage not proved—Mortgage of different date found—Redemption not to be granted.

Suit to redeem a mortgage of 1833. The defendants denied the plaintiff's right, and contended that they were the owners of the suit properties. The court of first instance found that the mortgage of 1833 was not proved, but gave the plaintiff a decree on the ground that a mortgage for the same amount by the plaintiff to the defendants of the year 1816 had been proved in the course of the suit and that it had been acknowledged by the defendants in 1852. The suit was based also on plaintiff's title. The lower appellate court agreed with the findings of the first court, but dismissed the suit on the ground that the plaintiff had not proved the specific mortgage alleged by the plaintiff in his plaint. Plaintiff preferred this second appeal.

Held, dismissing the second appeal, that when the plaintiff failed to prove the mortgage alleged by him in his plaint, no decree

could be passed in his favour on the basis of any other mortgage which the court might find to be proved in the course of the suit

*Krishna Pillai v. Rangasami*¹ followed.

P. K. Nambyar for the appellant.

P. R. Sundara Aiyar and *C. V. Anantakrishna Aiyar* for respondents.

Benson J.
Bhashyam Aiyangar J. } *C. M. A. No. 129 of 1902.*
 1903, Feb. 2.

Gift, Incomplete—Want of registration—Document appointing guardian—Description of property.

Neither the donor nor his representative can be compelled to complete a deed of gift which is incomplete for want of registration.

A document which embodies several transactions may be directed to be registered so far as one or some of them is concerned.

A document which appoints a guardian does not require a description of the properties of the minor any more than a deed of agency requires a description of the properties of which a person is to be the agent within the meaning of S. 21 of the Indian Registration Act. Such documents do not relate to immoveable property.

T. R. Venkatarama Sastri for appellant.

C. V. Krishnaswami Aiyar for respondent.

Chief Justice.
 1903, Feb. 2. } *C. R. F. No. 203 of 1902.*

Civil Procedure Code Ss. 476, 477—Application for leave to sue in forma pauperis—Allegations in the petition—Jurisdiction of Court to enquire into the truth of the allegations.

Held, that a court will not be acting either without jurisdiction or with material irregularity in examining the pauper petitioner as to the allegations contained in the petition for leave to sue as a pauper, in order to satisfy itself whether the petitioner has "a right to sue."

V. Krishnaswami Aiyar for petitioner.

P. S. Sivaswami Aiyar for respondent.

1. I. L. R., 18 M. 462.

Chief Justice.

1903, Feb. 2.

} *C. R. P. No. 267 of 1902.*

Award—Filing award—Arbitrators—Failure to call for explanation—Misconduct—Setting aside award—Jurisdiction.

The petitioner presented a petition to the District Munsif under S. 525, C. P. C., for filing an award. The Munsif found that the arbitrators were guilty of misconduct inasmuch as the arbitrators did not call for any explanation from the respondent of certain vouchers and statements filed by the petitioner, and that the decision of the arbitrators was unsound. He, therefore, set aside the award.

Held, that the Munsif had no jurisdiction under S. 526, C. P. C., to set aside the award, that failure of the arbitrators to call for an explanation was at the most only an irregularity but did not amount to misconduct under S. 521, C. P. C., and that the Munsif had no jurisdiction to sit in appeal against the award. His Lordship remanded the case to the Munsif with an opinion that the award should be filed.

*Chintamallayya v. Thadi Gangireddi*¹ considered.

*Muhammad Nawaz Khan v. Alam Khan*² followed.

V. Krishnaswami Aiyar for petitioner.

R. Sivarama Aiyar for respondent.

Chief Justice.

1903, Feb. 3.

} *C. R. P. No. 295 of 1902.*

Registration Act S. 17—Lease for Rs. 50—Covenant to pay Rs. 66 to paramount landlord.

Suit on an unregistered lease (stipulating for a rent of Rs. 50 with a covenant that the tenant should pay a cist of Rs. 66 due by the lessor to the paramount landlord) to recover rent of Rs. 50 and also the cist which the lessor was obliged to pay to his paramount landlord on account of the default of the tenant to perform his covenant. The Munsif held that the rent under the lease was not only Rs. 50 but Rs. 116 including the cist covenanted to be paid by the tenant on behalf of the landlord; and that the lease required to be registered under S. 17 of the Registration Act.

1. I. L. R., 20 M. 89.

2. L. R., 18 I. A. 73; I. L. R., 13 C. 414.

Held, that the cist not payable to the lessor was not rent within the meaning of Section 17 of the Registration Act and that the lease was not compulsorily registrable.

P. R. Sundara Aiyar for petitioner.

V. Ramesam for respondent.

Chief Justice.
Subramania Aiyar J.
Davies J.
1903, Feb. 6.

} Cr. Rev. Case 524 of 1902.

Indian Penal Code S. 187—Intentional refusal to sign search list—Offence.

Held, that a person who intentionally refuses to sign a search list is not guilty of an offence under S. 187 I. P. C., because refusal to sign the list is not a refusal to assist the officer within the meaning of that section.

K. N. Aiyar for petitioner.

The Public Prosecutor (E. B. Powell) for the Crown.

Bhashyam Aiyangar J.
1903, Feb. 16.

} C. M. P. No. 954 of 1902 in C.
R. P. No. 123 of 1902.

Application for restoration after default—Civil Procedure Code, Ss. 103, 108 and 558—

Sections 103, 108 and 558 are not exhaustive.

A case dismissed under Ss. 102 and 551 and decided *ex parte* may be restored to file even if no sufficient cause for non-appearance is shown, if the Court thinks fit to do so—the difference being, whereas, in the case of sufficient cause for non-appearance being shown, the Court has no discretion, in other cases, it is discretionary for the Court to restore.

T. V. Vaidianatha Aiyar for petitioner.

V. Ramesam for counter-petitioner.

Benson J.
 Bhashyam Aiyangar J. } Appeal No. 114 of 1901.
 1903, Feb. 18.

Hindu Law—Adoption—Assent of one of two nearest Sapindas—The other not consulted—Husband's authority—Validity of adoption.

The assent of a sapinda in order to support an adoption must be the result of the exercise of independent discretion; and consequently an assent given on the faith of a representation by the widow that she had oral permission from her husband to adopt a son, when in fact she had none, would not be sufficient to support the adoption. But if the assenting sapinda knew that she had no authority from her husband and yet gave his assent, such assent would be sufficient to validate the adoption.

The assent of one of two nearest sapindas would not be sufficient, if the other sapinda was not consulted at all.

Semle (1) that the assent of the nearest sapinda or sapindas is enough to support the adoption.

(2) that the assent or dissent of even a majority of the sapindas may be overlooked, if it is improper.

(3) that if the whole body of nearest sapindas improperly refuse assent, assent of remoter sapindas may be enough to support the adoption.

(4) that assent of the older of the two nearest sapindas has no peculiar efficacy except where they were undivided with the deceased and then it may be sufficient as that of the managing member of the undivided family to which the deceased belonged.

(5) that the refusal by a sapinda to give his assent unless the widow adopted his son (who may be the nearest sapinda boy available for adoption) is not necessarily invalid.

T. V. Seshagiri Aiyar for appellant.

V. Krishnaswami Aiyar and *K. Subramania Sastri* for respondent.

Benson J.
 Bhashyam Aiyangar J. } L. P. A. 40 of 1901.
 1903, Feb. 18.

Transfer—Sub-Court newly established—Direction ‘to post cases’—Irregularity—Waiver.

Under the direction of the High Court “to post cases” to the Subordinate Court newly established at Trichinopoly, the District Judge transferred cases to the Sub-Court, among which was a petition to sue in *forma pauperis*. The Subordinate Judge having dismissed the petition, an objection was taken for the first time in the High Court that the transfer was illegal as there was no proper order of the High Court transferring the case and as the petition was neither a suit nor an appeal which alone could be transferred under S. 25, C. P. C.

Held, that under S. 647 which extends the procedure of suits to miscellaneous proceedings, a petition to sue in *forma pauperis* could be transferred.

Held, also that though the proper course would have been for the District Judge to give a list of cases to be transferred and for the High Court to order a transfer of the same, yet as in fact the transfer was made in pursuance of an order of the High Court, the irregularity was one which could be waived by the parties and it must be deemed to have been waived by the parties when they did not take the objection either in the District Court or in the Subordinate Court.

V. Visvanatha Sastri for appellant.

P. S. Sivaswami Aiyar for respondent.

Chief Justice.
 Subrahmania Aiyar J. } S. A. 1307 of 1899.
 Davies J.
 1903, Feb. 19.

Civil Procedure Code, Ss. 13, 211, 373—Claim—Future profits on land—Giving up claim in the memo of appeal—Withdrawal—Res judicata.

In a suit for land and mesne profits, there is no cause of action for future profits and the plaintiff cannot insist on their being granted to him as a matter of right. But the court has power in its

discretion to provide for the payment of future profits under the terms of S. 211, C. P. C.

The "claim" which under S. 13 must, if not granted, be deemed to have been refused and under S. 373 cannot, if withdrawn without leave of Court, be made the subject of a fresh suit does not include a claim which the party may or may not put forward and which if put forward the Court is not bound to grant but in its discretion may or may not grant.

A fresh suit for profits subsequent to the date of the previous suit not granted by the previous decree is not barred as *res judicata* and in this respect there is no distinction between profits accruing prior to the previous decree and those accruing after its date.

In a suit for land the plaintiff claimed future profits. The whole suit was dismissed by the District Munsif and thus no question of profits arose. In the memorandum of appeal the plaintiff entered a note that he reserved his claim for subsequent profits to another suit. The land was decreed to him and he brought this suit for the future profits.

Held, that the suit was not barred either by S. 13, Cl. 3 on the ground that it must be deemed to have been refused in the previous suit or by S. 373 on the ground of withdrawal without permission.

K. Ramachandra Aiyar for appellant.

T. Natesa Aiyar for respondent.

Subrahmania Aiyar J.

Davies J.

Benson J.

1903, Feb. 20.

} *Cr. R. C. 292-4 of 1902.*

Indian Penal Code, Ss. 153, 296—Assembly engaged in religious worship—Disturbance—Highway—Procession—Malignant incitement to riot by illegal act.

The accused, Vadagalai Aiyangars, followed the procession of an idol along a highway reciting Tamil *prabandhams*. A complaint having been preferred against them under Ss. 153 and 296, I. P. C., for disturbing the religious worship of those who were reciting *prabandham* in front of the idol, the accused were convicted. The

Chief Justice and Bhashyam Aiyangar, J., who heard the revision petition differed and the matter was referred to the Full Bench.

Held, by the Full Bench agreeing with *Bhashyam Aiyangar, J.*, that there was no disturbance to religious worship and that the accused were not guilty.

Held, by *Subrahmania Aiyar* and *Bhashyam Aiyangar, JJ.*, that apart from the right of an individual or a body of individuals to pass and repass along the highway there was no right to carry on a procession along a highway, that the procession was not "lawfully engaged in religious worship" on the highway and that the accused could not therefore be guilty of an offence under S. 296, I. P. C.

Held, also that an ordinary act of worship like the recitation of the *prabandhams* by the accused was not and could not be a malignant, wanton or illegal act within the meaning of S. 153, I. P. C., and was not punishable under that section.

Held, by *Benson J.*, that a highway should be deemed dedicated to all purposes for which highways according to the custom of the country are ordinarily used, that the procession was according to custom engaged in religious worship but that there was no indictable disturbance of such worship.

Held, by the *Chief Justice* that there was a disturbance to an assembly lawfully engaged in religious worship and that the accused were rightly convicted.

T. V. Seshagiri Aiyar for appellant.

Advocate-General for respondent.

<i>Subrahmanya Aiyar J.</i>	}	<i>S. A. No. 1316 of 1901.</i>
<i>Bhashyam Aiyangar J.</i>		
1903, Feb. 23.		

Decree for possession on payment of purchase money—Right to sue for purchase money barred.

A vendee sued for possession of property from the vendor. The District Munsif gave a decree for plaintiff. The District

Judge in appeal found that the purchase money had not been paid and directed possession to be delivered on payment of the purchase money by the plaintiff.

Objection was taken in second appeal that the lower appellate court should not have given a conditional decree but should have left the defendant to file a separate suit for the purchase money. Three years had elapsed since the date of sale, and therefore a separate suit would be barred.

Held that as the vendor was in possession of the property with a lien over it, a decree directing possession to be given on payment of purchase money is proper, though the vendor's right to bring a suit for the same was barred by Art. 111 of the Limitation Act.

C. Venkatasubbaramiah for appellant.

P. Nagabhushanam for respondent.

Chief Justice,
Davies J.
Benson J.
1903, Feb. 24.

} Cr. Rev. Case No. 953 of 1902.

Criminal Procedure Code, S. 195, cl. 7 and 407, cl. 2—“ Court to which appeals ordinarily lie.”

The question referred to the Full Bench was whether a Magistrate who was directed and empowered to hear appeals under the provisions of S. 407 (2) of the Criminal Procedure Code was “a Court to which appeals.....ordinarily lie” within the meaning and for the purposes of S. 195 (7) of the Code.

Held (*Benson J.* dissenting) that appeals lie to the District Magistrate and not to the Sub-Divisional Magistrate, and that therefore the Sub-Divisional Magistrate's Court is not a Court to which “appeals...ordinarily lie” within the meaning of S. 195, cl. 7.

*Queen Empress v. Subbaraya Pillai*¹ distinguished.

1. I. L. R., 18 M. 487.

Benson, J.—The words “may be presented” in S. 407 (2) mean that appeals lie to such Court.

P. K. Nambiyar for petitioner.

J. G. Smith for the *Public Prosecutor* for the Crown.

Benson J. ^{pass} } *C. C. C. A. No. 11 of 1902.*
Bhashyam A. ^{vision} *r, J.* }
 1903, 1 ^{ge}

Hindu Law.—Mortgage of specific undivided item—Partition—Allotment of different property—Possibility of allotting mortgaged property—Rights of mortgagee.

One house consisted of two parts (say A and B) each opening into a different street and denoted by different Municipal numbers. One of two brothers who owned this house mortgaged A to the plaintiff in the suit. Subsequent to this mortgage, the brothers entered into a partition at which B was allotted to the mortgagor, and A was allotted to the other brother. A was sold by this last mentioned brother to a stranger. The mortgagor to whose share B fell sold B to a stranger who *bona fide* after searching the records at the Sub-Registrar's Office took the conveyance. In a suit by the mortgagee, the Judge held *inter alia* that the mortgagee was bound by the partition and could not proceed against A and that he could not proceed against B allotted to his mortgagor as that had been sold to a *bona fide* purchaser.

Held that the mortgagee was not bound by the partition and that as A could have been allotted instead of B to his mortgagor, the mortgagee should have a decree for sale of A.

P. S. Sivaswami Aiyar for appellant.

Sundaram Sastri and *Kumarasami* and *R. Sivarama Aiyar* for respondents.

RECENT CASES.

Boddam J.
Bhashyam Aiyangar J. } S. A. No. 1443 of 1901.
1902, Mar. 2.

Contribution as between judgment-debtors—Payment of less than proportionate share—Balance barred.

There was a decree for a certain sum against two people who were joint debtors in the first instance. A sum, less than half the decree amount, was recovered from one of the judgment-debtors and the recovery of the balance was allowed to become barred. The judgment-debtor, from whom a portion of the decree-debt was realized, sued the other judgment-debtor for contribution of half of the amount realized from him.

Held that the defendant was not bound to contribute inasmuch as the plaintiff had not paid more than his portion of the debt.

K. Ramachandra Aiyar for appellant.

A. Nilakanta Aiyar for respondent.

Boddam J.
Bhashyam Aiyangar J. } S. A. No. 1608 of 1903.
1903, Mar. 4.

Mortgages—Decree on each mortgage without the other mortgage—Purchases by mortgagees in each execution—Adverse possession by earlier purchaser—Limitation—Right of prior purchaser.

There were two mortgages of the same property in 1878 and 1880 respectively. The first mortgagee sued for sale in 1882 and purchased the property in execution of his decree in 1888. The second mortgagee sued for sale in 1884 and purchased the property in execution of his decree in 1886. But to each suit the other was no party. The prior mortgagee (but subsequent purchaser) brought this suit to recover the property on the strength of his purchase and symbolical delivery to him in 1889. The defendant who was

subsequent mortgagee pleaded that he was not affected by the subsequent purchase of the prior mortgagee and that the suit was barred.

Held, that the prior mortgagee who had no right of possession could not affect the earlier purchaser by a consent decree to which he was no party and that even if he was entitled to get possession of the property, the suit was barred as the second mortgagee purchaser had been in adverse possession for more than 12 years from 1886.

P. S. Sivaswami Aiyar and C. Venkatasubbaramaia for appellants.

P. R. Sundaraiyar and C. V. Anantakrishnaiyar for respondents.

<i>Boddam J. Bhashyam Aiyangar J. 1903, Mar. 5.</i>	}	<i>S. A. No. 1007 of 1901.</i>
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Document, nature of—Kanom, mortgage or lease—Disclaimer, effect of—Forfeiture of tenancy before expiration of term—Disclaimer by karnavan, effect of, on tarwad.

A kanom in Malabar whereby the mortgagee agrees to appropriate a portion of the income in lieu of interest due to him and also to pay the balance to the mortgagor is an anomalous mortgage and not a lease.

A disclaimer by a kanomdar of the jenmi's title cannot work a forfeiture when the period of the kanom is fixed in the contract itself.

Quære.—Whether a disclaimer by the karnavan of the jenmi's title, will entail a forfeiture on the tarwad.

C. Krishnan for appellant.

T. R. Ramachandra Aiyar for respondent.

Boddam J.
Bhashyam Aiyangar J. } S. A. No. 1421 of 1901.
1903, Mar. 5.

Revenue—Liability to pay—Alienation after revenue accrued due.

The person who was in possession of property at the time when arrears of revenue accrued due is liable to pay the revenue and a subsequent alienation by him cannot relieve him from his liability.

R. Kuppusami Aiyar for appellant.

T. V. Seshagiri Aiyar for respondent.

Subrahmaniam Aiyar J.
Benson J. } S. A. No. 1491 of 1901.
1903, Mar. 5.

Hindu Law—Adoption—Eligibility of son—Relationship between mother and adopting father—Brother's daughter's son.

The adoption by a Hindu of his brother's daughter's son is valid by the custom prevalent in Southern India. So held in accordance with the ruling in *Vyadinada v. Appu* which really related to the adoption of a brother's daughter's son though the custom investigated was that of adopting the daughter's son, it apparently having been the opinion of the court that if the adoption of one's own daughter's son was valid by custom, the adoption of one's brother's daughter's son should *a fortiori* be so.

Joseph Satya Nadar for appellant.

P. S. Sivaswami Aiyar for respondent.

Boddam J.
Bhashyam Aiyangar J. } S. A. No. 972 of 1901.
1903, Mar. 6.

Vendor and vendee—Undertaking by vendee to pay purchase money to vendor's creditor—Delay in payment—Execution of promissory note by vendor to creditor for interest—Suit against vendee for damages.

A vendee of property stipulated with the vendor that he would pay the purchase money to a creditor of the vendor. The

sale deed contained a recital of an absolute discharge, i. e., that the purchase money had been received by the vendor. The vendee failed to pay the money to the creditor at once, but paid it a year after the date of sale. The creditor demanded interest for the intervening period from the vendor and obtained a pronote from him for the interest due to him. The vendor before paying the amount of the pro-note at once brought a suit against the vendee for damages, basing his cause of action on his execution of the pro-note.

Held that the plaint did not disclose a cause of action for the recovery of damages.

S. A. 1253 of 1900 (unreported) followed.

T. Ranga Ramanuja Chariar for appellant.

M. R. Ramakrishna Aiyar for respondent.

Chief Justice
Subrahmania Aiyar J.
Davies J.
1903, Mar. 10. } S. A. 3 of 1902.

Rent Recovery Act—Landlord—Registered proprietor—Summary proceeding.

There is nothing in the Rent Recovery Act or in any other statute which requires that a transferee of or successor to a jaghir (or Zemindari etc.) should be registered as jaghirdar etc., in the collector's register before he can proceed under the Rent Act.

*Subbu v. Vasantappan*¹, *Vizianaguram Maharaja v. Suryanarayana*², and *Venkataswara Yettiappa v. Alagoo Moolko*³ followed.

*Valarama v. Virappa*⁴ and the later cases following it not followed.

Tendering a patta is not a proceeding for arrears of rent within the meaning of S. 80 of the Rent Recovery Act; the tenor of the whole section shows that it refers to the summary proceedings to recover rent after the rent has accrued due and not to the tender of patta which is antecedent thereto.

P. S. Sivaswami Aiyar for *T. Rangachariar* for appellant.

V. C. Seshachariar for respondent.

1. I. L. R., 8 M. 351.

2. I. L. R., 9 M. 307.

3. 8 M. I. A. 327.

4. I. L. R., 5 M. 145

Subrahmania Aiyar J.
Davies J.
 1903, Mar. 13.

} A. S. No. 216 of 1900.

*Hindu Law—Adoption—Husband's authority to adopt—
 Authority in general terms—Right of widow to adopt more than
 once—Assent of sapindas—Sufficiency of assent.*

Having regard to the ordinary intention of a Hindu who
 authorises an adoption, an authority in general terms should be
 construed to authorise successive adoptions if the adopted sons
 die without fulfilling the object for which an adoption is intended.

Three out of five of the nearest sapindas in 1899 assented
 to an adoption by a widow. The assent was to her adopting *any*
 son at *any* time. The widow actually adopted *nine* years later
 in 1898. In the meanwhile *some of the assenting sapindas had*
died :—

Held that the assent was not sufficient to validate the
 adoption.

P. S. Sivaswami Aiyar (with *V. Ramesam* and *S. Srinivasa
 Aiyangar*) for appellant.

T. V. Seshagiri Aiyar for *V. Krishnasami Aiyar* (with *P. R
 Sundara Aiyar* and *K. Subramania Sastri*) for respondents.

Subrahmania Aiyar J.
Davies J.
 1903, Mar. 13.

} C. M. S. A. No. 15 of 1901.

*Civil Procedure Code, Ss. 211, 396—Partition—Mesne Profits
 —Date up to which recoverable.*

Partition decree is complete when the lands to be allotted to
 each sharer is ascertained and the court allots separate lands to
 each. Mesne profits directed to be paid by the preliminary decree
 settling the shares are therefore recoverable for a period which
 is within three years of the final decision though more than three
 years from the date of the preliminary decree.

K. Srinivasa Aiyangar for appellant.

Benson J.
Bhashyam Aiyangar J. } *S. A. 1174 of 1900.*
 1903, *Mar.* 17.

Madras Act II of 1864, S. 51—Limitation—Suit to set aside sale—Sale void for want of jurisdiction.

The suit was brought to set aside a revenue sale held under the Revenue Recovery Act within one year from the date of confirmation, but after six months from the date of sale. The amount of arrears was tendered to the village officials the day before the sale, but the village officials in collusion with the purchasers, refused to accept the amount and held the sale. It was contended that the limitation prescribed in S. 59 of the Act cannot apply inasmuch as the sale itself was without jurisdiction and therefore not a sale under the Act.

Held that the limitation was 6 months from the date of sale as prescribed in S. 59 of Act II of 1864.

V. Ramesam for appellants.

K. Ramachandra Aiyar for respondents.

Subrahmania Aiyar J.
 Davies J. } *C. M. A. 155 of 1902.*
 1903, *Mar.* 19.

Res judicata—Suit for acceptance of patta in Revenue Court—Suit for rent for same year.

Where the Revenue Court declares a patta to be proper and enforces acceptance of patta, it is not open to the Civil Court in a suit for rent *for the same fasli* to go behind the judgment of the Revenue Court and inquire into the propriety of patta. The decision of the Revenue Court is conclusive for that fasli and binds all courts, as it would defeat the very object of the revenue suit to allow the propriety of the patta to be again questioned. The principle of competency of the court which tried the earlier suit to try the later suit is not applicable where the object matter is the same.

*Rangayya Appa Rao v. Ratnam*¹ referred to.

S. Gopalasami Aiyangar for appellant.

T. V. Seshagiri Aiyar for respondent.

1. I. L. R., 20 M. 392.

Benson J.
 Bhashyam Aiyangar J. } S. A. 1138 of 1901.
 1903, Mar. 19.

Insolvency—Vesting order—Discharge—Composition before discharge—Title of trustee—Insolvency Act, S. 7.

When a vesting order becomes null and void under S. 7 of 11 Vict. Cap. XXI, it operates retrospectively from the date of the vesting order subject to the proviso and the effect except for the proviso is the same as if the property was throughout in the original owner.

When after the vesting order the debtor entered into a composition with the creditors, and on the production of the composition deed the Insolvent Court dismissed the petition so as to discharge the vesting order, a creditor contended that the composition was of no effect and the trustee under it acquired no title to the debtor's property, as on the date of the composition the debtor was possessed of no property to transfer to the trustee.

Held, that on the dismissal of the petition it was as if the vesting order had never been passed and that the trustees acquired a valid title under the composition deed.

V. Krishnaswami Aiyar and A. S. Balasubramania Aiyar for appellants.

T. V. Seshagiri Aiyar and V. Ramesam for *R. Kuppusami Aiyar* for respondents.

Benson J.
 Bhashyam Aiyangar J. } A. 136 of 1901.
 1903, Mar. 20.

Hindu law—Illegitimate son and adopted son—Right of illegitimate son to claim partition against adopted brother and his cousins—Maintenance.

A, died leaving an illegitimate son, his own father and a brother. Subsequently a son was adopted to A. by his wife. Then the father died, and then the brother died leaving a son. The

illegitimate son sued for partition of the family properties between him, his adoptive brother, and his cousin :—

Held, that he was not entitled to claim partition against a collateral who had succeeded to his father's properties by survivorship.

Held, also, that he was entitled to maintenance, which, however, would not be that of a disqualified heir but only a compassionate allowance.

V. C. Desikachariar for appellant.

V. Krishnaswami Aiyar, P. R. Sundara Aiyar and K. N. Aiyar for respondents.

<i>Benson J.</i> <i>Bhashyam Aiyangar J.</i> 1903, Mar. 20.	}	<i>S. A. 1627 & 1628 of 1901.</i>
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Hindu law—Widow—Presumptive reversioner—Relinquishment in favour of widow—Donee of widow—Title of donee as against reversioner.

The presumptive reversioner of a Hindu widow relinquished his reversionary claim to the widow for consideration and authorised her to alienate the properties at her will and pleasure. At her death she gifted the properties to the plaintiff. Even before her death, the reversioner purported to mortgage his reversion to the defendant who obtained a decree for sale and purchased the properties in execution. The plaintiff brought this suit for a declaration that the mortgage and sale were not binding on him.

Held, that the relinquishment did not operate to divest the reversioner of his reversion and that the widow's donee was not entitled to the estate as against the reversioner.

T. V. Seshagiri Aiyar for appellant.

V. Krishnaswami Aiyar for respondent.

Benson J.
Bhashyam Aiyangar J. } *S. A. No. 1633 of 1901.*
 1903, Mar. 23.

*Civil Procedure Code, S. 43—Injunction to vacate—Possession
 —Unregistered lease—Payment of rent—Ejectment.*

Plaintiff brought a suit in 1899 for arrears of rent due from defendant and for an injunction against the defendants to vacate the house. The claim was based under a rent deed executed by defendants in 1894. The District Munsif dismissed the suit on the ground that the lease deed not being registered was inadmissible in evidence, and also held that the prayer for injunction (plaintiff being out of possession) could not be sustained and that the proper prayer was one for possession. The plaintiff thereupon brought the present suit, basing his claim on his title for possession and for damages (being the amount of rents for 3 years prior to suit). The District Munsif found that the defendants were paying rent to plaintiff and that, therefore, the plaintiff was in possession within 12 years prior to suit and decreed the plaintiff's claim. The District Judge on appeal reversed the Munsif's decree, holding that the suit was barred by S. 43, C. P. C.

Held (1) that S. 43 was inapplicable to the case and that the suit based on title was maintainable ;

(2) that a prayer for an injunction directing the defendants to vacate the house was nothing but a prayer for possession ;

(3) that the proper remedy, if any, for the plaintiff was to bring a suit for ejectment on denial of plaintiff's title, if any ;

(4) that the suit upon title could not be sustained when in fact the Munsif had found payment of rent by defendant.

S. Srinivasa Aiyar for appellant.

P. R. Sundara Aiyar for respondent.

Benson J.
Bhashyam Aiyangar J. } S. A. No. 1473 of 1901.
 1903, Mar. 24.

Hindu law—Maintenance—Illegitimate son—Son born of a native Christian by a Sudra.

An illegitimate child of a Hindu Sudra by a native Christian concubine is not entitled to claim maintenance from his estate.

V. Krishnaswami Aiyar and A. Nilakantaiyar for appellants.
J. L. Rosario for respondents.

Chief Justice.
Boddam J. } C. M. P. Nos. 987, 988 of 1900.
 1903, Mar. 26.

Redemption—Interest in property—Agency coupled with interest.

Where agency coupled with interest is created in respect of mortgaged properties, the agent is entitled to redeem in his own name under S. 91 of the Transfer of Property Act.

Where after mortgaging devaswom properties, the stani appointed an agent to manage the properties for 18 years and authorised him to recoup^c himself for all expenses incurred from the income of the stanom properties including the devaswom, the agent had an interest in the properties within S. 91 of Transfer of Property Act and could redeem in his own name.

*Muhammad Mohidin Sait v. The Municipal Commissioners the City of Madras*¹ reversed on review.

P. R. Sundara Iyer for petitioner.

K. P. Govinda Menon for respondents.

Benson J.
Bhashyam Aiyangar J. } S. A. No. 840 of 1900.
 1903, Mar. 25.

Limitation Act, S. 14—Prosecution of suit—Due diligence—Same cause of action—Same plaintiffs—Same reliefs.

In 1889, two persons brought a suit in the District Munsifs Court to recover certain properties as reversioners to a widow

¹ I. L. R., 25 M. 118.

who died in 1879. A third person claimed as being jointly entitled with them and was added as plaintiff. The defendants objected to the valuation of the suit. The Commissioner who was appointed to ascertain the valuation reported that the properties were undervalued and the proper valuation took the case out of the jurisdiction of the Court. The District Munsif directed the return of the plaint for presentation to the proper court. This was in March 1890. In April the two plaintiffs who originally instituted the suit gave up some items in order to bring it within the jurisdiction of the court and asked the Munsif to retain the plaint on his file and proceed to hear the case in respect of the other items. The District Munsif gave a decree in favour of the original plaintiffs, holding that the additional plaintiff was not entitled. The defendants appealed, one of their contentions being that the plaintiffs ought not to have been allowed to relinquish items after the institution of the suit in order to give jurisdiction to the Court. In August 1894 the District Judge returned the plaint for presentation to the proper Court. This suit was filed soon after in the Subordinate Court of Nellore.

The defendant's contention was that the suit was barred. As to whether S. 14 will give the plaintiffs a deduction of time spent in prosecuting the previous suit the defendants contended (1) that at least as to the items relinquished there was no proceeding prosecuted with due diligence between March 1890 and August 1894, and (2) that no deduction could be claimed at all because the suit was not on the same cause of action the plaintiffs and the properties claimed not being the same.

Held (1) that the plaintiffs were entitled to a deduction of time between those dates and the suit was therefore not barred, (2) that the omission of the added plaintiff was no objection especially as he had been found not to be entitled, and (3) that the plaintiffs were entitled to all the items including those wrongly relinquished in the District Munsif's Court.

T. V. Seshagiri Aiyar for appellant.

P. R. Sundara Aiyar and *P. Nagabhushanam* for respondent.

Benson J.
Bhashyam Aiyangar J. } *S. A. Nos. 1046 and 1047 of 1901.*
 1903, *Mar.* 26.

Patta—Sale of part of patta lands—Default of pattadar to pay his quota of revenue—Sale of purchaser's land—Purchase by pattadar—Trust—Cancellation of sale—Revenue Recovery Act, S. 59.

A pattadar after alienating part of the properties comprised in his patta committed default in payment of his quota of revenue. The properties including those alienated were brought to sale under the Revenue Recovery Act. The properties were purchased by a third party. The alienee brought this suit alleging that the pattadar was the real purchaser and that the sale could not affect his rights. Both the Courts below dismissed the suit as barred, the suit not having been brought within six months of the sale. It was contended that the suit was not really, though expressed to be, a suit for cancellation of sale, that the pattadar having purchased the properties in a sale due to his default in paying his quota of revenue which was a duty he owed to the alienee, should hold them in trust for the alienee.

Held that even where fraud is alleged a suit to set aside a revenue sale should be brought within six months, but that this suit was not to set aside a sale but to affirm the sale and enforce the constructive trust to which the properties were subject in the hands of the pattadar and that the suit was therefore not barred.

V. Krishnaswami Aiyar and A. Nilakanta Aiyar for appellant.
P. S. Sivaswami Aiyar for respondent.

Benson J.
Bhashyam Aiyangar J. } *S. A. No. 459 of 1901.*
 1903, *Mar.* 26.

Hindu Law—Sister—Provision for marriage.

Where brothers forming members of an undivided Hindu family have an unmarried sister, provision for the sister's marriage will usually be made only at the time of her marriage.

In this case all the properties of the family were sold in execution and the balance of sale proceeds after discharging the debt was in Court. The sister brought this suit for having some provision made for her maintenance and marriage.

Held that the sister was entitled to maintenance until marriage, and that having regard to the fact that the money in court was the only property had by the family provision ought also to be made for her marriage though the marriage was not about to be celebrated.

Their Lordships ordered 250 Rs. to be paid to the guardian after taking security from him for the return of the money to the brothers if the marriage of the sister was not celebrated.

P. R. Sundara Aiyar for appellant.

K. Narayana Row for respondent.

Chief Justice.

Boddam J. } *S. A. No. 1606 of 1901.*
1903, *Mar.* 26.

Lease—Assignment—Rent—Liability of assignee.

The assignee of a lease is liable for rent accruing due after assignment by reason of the privity of estate between the assignee and the landlord, even though the assignment was against covenant not to "sublease, etc., and the assignee was not recognized by the landlord as lessee."

*Kunhanujan v. Anjelu*¹ followed.

An assignee of the interest of one of several joint and several lessees stands in the shoes of his assignor and is jointly and severally liable for rent.

P. R. Sundara Aiyar for appellant.

V. Krishnaswami Aiyar and *S. Srinivasa Aiyar* for *A. S. Balasubrahmaniam Aiyar* for respondents.

Subrahmaniam Aiyar J.

Davies J. } *C. M. S. A. No. 28 of 1902.*
1903, *Mar.* 27.

Execution—Step in aid—Limitation—Batta.

Payment of batta unaccompanied by any application is not a step in aid of execution and cannot afford a fresh starting point of limitation within Art. 179 of the Limitation Act.

*Radha Prasad Singh v. Sundar Lal*² not followed; *Malukchund Ratanchand v. Natha*³ and *Thakur v. Katwaru*⁴ followed.

C. Sankaran Nair for appellant.

C. V. Anantakrishnaiyar for respondent.

1. I. L. R., 17 M. 296.

2. I. L. R., 9 C. 644.

3. I. L. R., 25 B. 639.

4. I. L. R., 22 A. 358.

Subrahmania Aiyar J.
Davies J.
Boddam J. } S. A. Nos. 1385 and 1386 of 1901.
 1903, Feb. 27 & April 8.

Two co-uralans—Suit by one—The other not asked to join, but made defendant.

On a reference to the Full Bench by *Subrahmania Aiyar* and *Bhashyam Aiyangar JJ.* in consequence of doubts expressed as to the correctness of the decision in *Savitri Antarjanam v. Raman Nambudri*¹ for reasons stated in S. A. Nos. 77 and 78 of 1901, the Full Bench held that one of two co-uralans may without averring in the plaint that the other uralan was asked to join the former as co-plaintiff and that he refused to do so, bring a suit for redeeming a mortgage made by the predecessors in title of the two uralans making the other uralan a party defendant along with the mortgagees.

P. R. Sundara Aiyar and *C. V. Anantakrishna Aiyar* for appellants.

V. Ryru Nambiar and *B. Govindan Nambiar* for respondents.

Chief Justice.
Bhashyam Aiyangar J. } S. A. No. 1524 of 1901.
 1903, April 2.

Registration Act, S. 17—Lease with rent in kind—Term of lease not exceeding five years—Compulsory registration.

A lease wherein the rent fixed is not in money (exceeding Rs. 50) but in kind is not compulsorily registrable if the term of the lease does not exceed 5 years.

K. Ramachandran for appellant.

T. V. Seshagiri Aiyar for respondent.

Subrahmania Aiyar J.
Benson J.
 1903, April 2. } *Referred Case No. 2 of 1903.*

Small Cause Suit—Suit filed on regular side—No objection to jurisdiction—Objection taken in appeal—Reference to High Court.

A suit which was cognizable by a Court of Small Causes was filed on the Regular Side of the Munsif's Court. Objection as to jurisdiction was not taken by the defendant and a decree was passed by the Munsif in plaintiff's favour. The defendant appealed to the District Court, took objection to jurisdiction of the District Munsif for the first time in the District Court. The District Judge referred the case to the High Court under S. 646-B.

Their Lordships went into the merits of the case and confirmed the Munsif's decree.

Suresh Chunder Maitra v. Kristo Rangini Dasi followed.

C. Krishnan for appellant.

T. V. Seshagiri Aiyar for respondent.

Chief Justice.
Subrahmanya Aiyar J.
 1903, April 7. } *S. A. Nos. 1637 and 1215 of 1901.*

Appeal—Order rejecting an appeal as barred.

An appeal lies from an order rejecting an appeal as presented out of time.

Judgment was delivered on 22nd of December 1900 between 4 and 5 P.M. The Christmas holidays began the next day. The Court re-opened on the 7th January 1901, when application for copy of judgment was put in and the appeal was filed on a day when it will be in time if the time between 22nd December 1900, and 7th January 1901, were excluded. It was contended for the appellant that the time should be excluded as he could not have possibly applied for copies on 22nd December 1900 as the judgments was delivered after 4 P.M. and no application for copies could have been made after that time under the rules. It was contended for the respondent that the words "requisite for obtaining copies" presupposes the existence of an application already made, and in the absence of such application the time preceding the application could not be deducted.

Held that the time between 22nd December 1900 and 7th January 1901 should be deducted in appellant's favour and that the time "requisite for obtaining copies" included the time requisite for making an application for a copy.

T. Subrahmanya Iyer for *P. S. Sivaswami Aiyar* for appellant.

V. Krishnaswami Iyer and *C. V. Krishnaswami Iyer* for respondent.

K. Ramachandra Aiyar for respondent in S. A. No. 1637 of 1901.

Benson J.
Bhashyam Aiyangar J. } *C. M. A. No. 142 of 1902.*
 1903, April 17.

Hindu Law—Joint family—Decree against one brother—Death—Survivor—Execution—Representative.

A suit was brought by plaintiff against 1st defendant for dissolution of a partnership and for a share of the profits. A decree *in personam* was passed against the 1st defendant in favour of the plaintiff. Subsequent to the decree the 1st defendant died and the plaintiff applied for bringing the widow of the 1st defendant and his undivided brother as legal representatives on the record and for execution being ordered against them. The suit was not brought against the 1st defendant as representing his family. The District Judge allowed the widow and the brother to be brought on the record and ordered execution against them in so far as they had received the assets of the 1st defendant.

Held that execution could not be ordered against the undivided brother as regards the assets (whether of the family or of the partnership) which has descended to him by survivorship.

*Hanumantha v. Hanumayya*¹, *Karpakambal v. Subbayyan*², and *Muttia v. Virammal*³ followed.

Also that the brother should not have been made legal representative of his deceased brother, but that attachment can be made of any self-acquired property of the deceased in the hands of the brother, just as in the hands of any stranger.

V. Krishnaswami Aiyar and *S. Srinivasa Aiyar* for appellant.

P. R. Sundara Aiyar, *T. Rangaramanujachariar* and *T. V. Gopalasami Mudaliar* for respondent.

1. I. L. R., M. 232.

2. Ibid., 234.

3. I. L. R., 10 M. 233.

RECENT CASES.

Subrahmania Aiyar J.
Benson J.
1903, April 2. } *C. M. A. No. 139 of 1902.*

C. P. C. S. 523—Agreement to refer to arbitration—Agreement filed in court—Subsequent death of one of the parties—Legal representative's right to continue arbitration.

An agreement to refer to arbitration was filed in court under S. 523, Civil Procedure Code, and a reference was made to the arbitrators by consent of parties. Subsequently before the award was made, one of the parties died.

Held, that the death of one of the parties did not put an end to the arbitration, as the right dealt with in the reference survived the death of the party and as the deceased man's legal representatives could carry on the arbitration.

K. Jagannatha Aiyar for *V. Ramesam* for appellant.

K. Subramania Sastri for respondent.

Benson J.
Bhashyam Aiyangar J.
1903, April 22. } *C. M. A. No. 185 of 1902.*

Execution application against deceased Judgment-debtor after direction to bring legal representatives on record—Limitation, no saving of—No application against legal representatives within 3 years after knowledge of death.

The decree-holder put in an application for execution against the deceased judgment-debtor. The notice was returned with the endorsement that the judgment-debtor was dead. The Court thereupon directed the decree-holder to bring the legal representatives of the judgment-debtor on record. That was not done and a second application for execution against the deceased judgment-debtor was put in.

Held, that the second application was bad and could not save any subsequent application from the bar by limitation under Art. 179.

K. Subramania Sastri for appellant.

V. Ramesam for respondent.

Benson J.
Bhashyam Aiyangar J. } C. R. P. No. 273 of 1902.
 1903, April 23.

Indian Contract Act Ss. 69, 70—Repair of Government tank by Government—Liability of inamdar having lands in irrigated area to contribute.

Government repaired a certain tank. Of the lands irrigated by the tank $\frac{2}{3}$ was ryotwary land and $\frac{1}{3}$ was the land of the defendant who owned the same as inamdar. The suit was brought by Government for contribution by defendant of $\frac{1}{3}$ of the cost of repairs.

Their Lordships held that the inamdar was not liable to contribute and that Ss. 69 and 70 of the Indian Contract Act did not apply.

*Damodara Mudaliar v. Secretary of State for India*¹ distinguished.

The Government Pleader (E. B. Powell) for petitioner.

P. R. Sundara Aiyar for respondent.

Benson J.
Bhashyam Aiyangar J. } S. A. No. 1431 of 1901.
 1903, April 24.

Dedication of land to an idol—Gift—Compulsory registration, effect of—Public as donee.

Where a person conveys some lands to an idol in the following terms: "I found you in the inam land which I bought from carpenters and Rayapareddi Varu and which I was enjoying. You have been placed there. The land of 5 Kunchams is given to you out of my own free will, so that a temple may be built on it. In case a permanent temple be built for you, neither I nor my heirs will object. I bind myself to be your Dharmakarta."

Held, that the words amounted to a dedication of the temple to the public.

That the word "donee" was not applicable to the public but only to an ascertained person and the instrument of dedication was therefore not an instrument of gift.

That the instrument of dedication though compulsorily registered conveyed the property to the public.

T. V. Seshagiri Aiyar for appellant.

K. Narayana Row for respondent.

RECENT CASES.

Subrahmania Aiyar J.
Moore J. } *S. A. No. 1678 of 1901.*
1903, April 24.

*Government tank—Right to water—Bund—Deficiency in supply—
Right of suit.*

The defendants cut off a bund of a Government tank irrigating the land of the plaintiffs. The supply of water to the plaintiff's lands was alleged to have consequently diminished and the plaintiffs sued the defendants for injunction and damages.

Held, that the plaintiffs' right or interest in the Government tank was either an easement or a right in the nature of an easement and their interest in the tank gave them the right to sue for the relief prayed for against the defendants who did not act under the authority of Government.

V. Krishnaswami Aiyar and C. V. Krishnaswami Aiyar for appellant.

P. R. Sundara Aiyar and A. S. Balasubrahmania Aiyar for respondent.

Chief Justice
Bhashyam Aiyangar J. } *S. A. No. 1563 of 1901.*
Moore J.
1903, July 13.

Construction—"Avasyamayi Chodikumbole"—"Avasyamayi Vendumbole."

The question referred to the Full Bench was one of construction of the words "Avasyamayi Chodikumbole" and "Avasyamayi Vendumbole" in two kanom documents. The point was whether the words mean nothing more than "on demand," or "on demand based on some special exigency" on the part of the plaintiffs' mortgagors.

Held:—following *S. A. No. 1665 of 1898* that the words do not impose on the mortgagor the obligation to show some special exigency before redeeming.

I. L. R., 14 M. 76 overruled.

K. P. Govinda Menon for appellant.

C. V. Anantakrishna Aiyar for respondents,

Chief Justice
Bhashyam Aiyangar J.
Moore J.
 1903, July 14. } S. A. No. 1461 of 1901.

Suit for declaration—Vakil's fees.

In a suit for a declaration that plaintiff has got a right to have his name registered by the Revenue authorities as owner of immoveable property, the declaration was valued at Rs. 250 and the consequential relief at Rs. 5. The Courts below granted a decree for the plaintiff and allowed a fee of Rs. 250 for the plaintiff's Vakil. It was objected to in second appeal that the suit was one for a declaration in respect to immoveable property which according to the plaint is valued at Rs. 255, and that no fee higher than the *ad valorem* fee on that amount can be allowed.

Their Lordships Mr. Justice *Subrahmaniam Aiyar* and Mr. Justice *Moore* before whom the case first came on for disposal referred the following question to the Full Bench.

"In a case for a declaration with respect to immoveable property is the fee to be allowed to a Vakil limited to a sum not exceeding the maximum fee allowable in a suit for the possession of the same property."

Their Lordships answered the question in the affirmative.

C. Ramachandra Rao Saheb for appellant.

K. Narayana Rao for respondent.

Benson J.
Bhashyam Aiyangar J.
 1903, July 15. } S. A. No. 777 of 1901.

Civil Procedure Code, S. 13, Clause 2 and S. 43—Suit upon a mortgage—Specific mortgage found false—Fresh suit upon admitted mortgage alleged to be discharged—Res judicata.

While S. 43, C. P. C., requires all *reliefs* claimable under a single cause of action to be claimed in a single suit and bars a fresh suit for any *reliefs* so omitted, S. 13, Clause 2, requires all *grounds of attack or defence* relating to the cause of action in

the plaint to be put forward and if omitted deems them to have been raised and decided.

But neither S. 13 nor S. 43 bars a fresh suit based upon a distinct cause of action, even though the reliefs claimed or the subject-matter may happen to be the same in both suits. For example, a suit for property as heir or survivor will be no bar to a suit upon a devise by will. *Kameswar Prasad's case*, I. L. R., 20 C 7 explained.

On this principle the dismissal of a suit on the ground that the cause of action alleged is false (either because the facts proved do not make out a cause of action or because the facts alleged are false) does not bar a suit upon the true cause of action.

Where a suit upon a mortgage was dismissed on the ground that the mortgage was not proved and a fresh suit was brought upon another mortgage which the defendant admitted but alleged to have been discharged, held that the suit was based upon a different cause of action and was not barred either under S. 13 or S. 43.

V. Krishnasami Aiyar and *K. Balamukunda Aiyar* for appellants.

T. V. Seshagiri Aiyar for respondent.

Benson J.
Bhashyam Aiyangar J. } *C. M. A. Nos. 111 and 112 of 1902.*
 1903, July 16.

Limitation Act, Arts. 178, 179—Decree for sale—Injunction before date fixed—Application within 3 years of the removal of injunction but more than 3 years from date fixed—Limitation.

Art. 178 of the Schedule to the Limitation Act is the residuary article in regard to applications and governs all applications for execution which do not fall under Art. 179.

The first column and third column are both parts of the article of limitation and should both be considered in determining whether the article applies.

Though therefore one of the starting points of limitation prescribed by the 3rd column of Art. 179 would ordinarily in the facts of a case govern an application for execution, yet if that starting point is not applicable because on such date no application was possible, then Art. 179 will not apply. In such a case the

application is governed by the residuary article and may be made within 3 years of the date when he can make the application.

A decree for sale was passed and time was given to the judgment-debtor to pay up. Before however that date arrived and the decree-holder could apply for sale, execution of the decree was stayed. An application for execution was put in within 3 years of the discharge of the stay-order but more than 3 years from the date fixed.

Held that the date fixed for payment of the money from which limitation will run under Art. 179 was inapplicable as on that date an application was prohibited by the stay order, that therefore Art. 179 was not applicable and that as Art. 178 was the only other article the application was not barred.

Kasturi Rangaiyangar for appellant.

A. S. Coddell and *P. S. Sivaswami Aiyar* for respondent.

Bhashyam Aiyangar J.

1903, July 16.

} *Cr. R. C. No. 189 of 1903.*

Sanction to prosecute—Charge sheet—Case rejected for impropriety of sanction—Joint Magistrate—Court to which appeals ordinarily lie—Power of appellate Court to revoke sanction after complaint preferred to it in accordance with the sanction.

Even though complaint has been preferred in accordance with sanction and is pending in the Court to which appeals ordinarily lie from the sanctioning Court, such appellate Court may still exercise its power of revoking sanction under S. 195, Cr. P. C.

A Joint Magistrate is not 'the Court to which appeals ordinarily lie' from a Magistrate of 2nd Class, and therefore he cannot revoke a sanction granted by such Magistrate.

Cr. R. C. No. 539 of 1902 referred to.

Where sanction has been given to prosecute a person for a *non-cognisable* offence, the Court cannot take cognisance of the case on a police charge sheet.

In the circumstances of the case it was thought unnecessary to consider whether sanction could be revoked by the appellate Court without a petition therefor; or whether a person other than the one to whom sanction was granted could initiate a prosecution.

K. Ramachandra Aiyar as *amicus curiæ*.

RECENT CASES.

Subrahmania Aiyar J. }
Boddam J. } L. P. A. No. 17 of 1903.
1903, July 27.

Civil Procedure Code, Ss. 406, 407, 408, 409—Petition for leave to appeal in formâ pauperis—Return for furnishing particulars—Enquiry into the truth of the allegations on the merits.

The appellant filed a petition to the District Judge of Coimbatore for leave to sue as a pauper. The District Judge returned the petition for amendment by way of supplying more particulars, and on receipt of the same, examined the applicant and some witnesses and dismissed the petition on the ground that the amended petition was not more explicit than the original one.

His Lordship the Chief Justice declined to interfere with the order of the District Judge.

Held, on appeal under the Letters Patent,

- (1) that the District Judge was wrong in asking for particulars;
- (2) that the District Judge could ask for particulars under S. 50 only after the petition for leave to sue as a pauper was granted; and
- (3) that the District Judge should not have gone into the evidence to investigate the truth or otherwise of the allegations in the petition regarding the merits of the case.

Ratnam v. Pappa (Full Bench)¹ followed.

V. Krishnaswami Aiyar for appellant.

P. S. Sivaswami Aiyar for respondents.

1. 13 M. L. J. R., 292.

Benson J.
Bhashyam Aiyangar J. } *S. A. No. 668 of 1901.*
 1903, July 28.

Agents' power to compromise—Power of attorney, construction of—Vakil.

Held, that the limitations applying to the competency of vakils to act in certain matters on behalf of the client (such as to compromise the suit) do not necessarily apply to agents holding power of attorney from the client to conduct the suit.

Where a junior member of the family gave a power of attorney to a senior member authorizing him to institute and conduct all suits with reference to the family assets and liabilities, and the senior member compromised a suit instituted on behalf of both of them.

Held that the power of attorney was wide enough to include the power to compromise.

T. V. Seshagiri Aiyar for appellant.

V. Krishnaswami Aiyar and *V. C. Desikachariar* for respondent.

Subrahmania Aiyar J.
Boddam J. } *C. M. A. No. 21 of 1903.*
 1903, July 30.

Civil Procedure Code, S. 244, Clause (c)—Execution of decree—Agreement not to execute the decree—Agreement prior to the passing of the decree—No separate suit.

The plaintiff obtained a decree and applied for execution. The defendant pleaded in execution that the decree could not be executed owing to an agreement between them, plaintiff and defendant, prior to the passing of the decree to the effect that plaintiff should not obtain a decree, and even if he did he should not execute it. The question arose whether that matter could be enquired into in execution.

Held, that the existence and the validity of the agreement ought to be enquired into in execution and not in a separate suit.

*Laldas v. Kishordas*¹ followed.

*Benode Lal Pakrashi v. Brajendra Kumar Saha*² distinguished.

J. L. Rosario for appellant.

T. Rangachariar for *C. Krishnan* for respondent.

<i>Subrahmania Aiyar J.</i> <i>Boddam J.</i> 1903, July 31.	}	<i>C. M. S. A. No. 60 of 1902.</i>
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Lis pendens—Decree for redemption—Sale by mortgagee after decree—Execution after lapse of time fixed—Delivery—Petition by purchaser to cancel delivery.

An order in execution of a decree for redemption against the judgment-debtor on record is binding on a purchaser from the judgment-debtor subsequent to decree on the doctrine of *lis pendens* which is applicable to execution proceedings also.

*Thakur Prasad v. Gaya Sahu*³, *Shivji Ram v. Waman*⁴, and *Har Shankar Prasad Singh v. Shew Gobind Shaw*⁵ followed.

A decree for redemption was passed in June. Plaintiff was allowed six months' time to pay up. After the time fixed had expired, the decree-holder applied for redemption. The court ordered delivery of the properties to him. Meanwhile the judgment-debtor had transferred the property to a third person. This person resisted delivery, and having been unsuccessful applied to the court to cancel the delivery, on the ground that execution was not taken out within the time fixed by the court and even then the full amount payable was not paid. The District Munsif

1. I. L. R., 22 B. 463.

2. I. L. R., 29 C. 810.

3. I. L. R., 20 A. 349.

4. I. L. R., 22 B. 939.

5. I. L. R., 26 C. 966.

dismissed the application, but the Subordinate Judge allowed the application:—

Held on appeal that as it was open to the court to extend the time under S. 93 of the Transfer of Property Act the order in execution was not wrong, that the order was binding on the purchaser by the doctrine of *lis pendens*, and that as the present application was not treated as one for review, the original order must stand as it had not been got rid of by appeal.

J. L. Rosario for appellant.

K. P. Govinda Menon for respondent.

<i>Subrahmania Aiyar J. Boddam J. 1903, August 6.</i>	}	<i>A. A. A. O. No. 54 of 1902.</i>
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Execution application—Order after notice—No appeal—Petition ultimately not proceeded with—Finality of order.

An application was made for execution on 22nd November 1898. Order was passed to the following effect on 4th January 1899: "Notice served personally for attachment. Defendant is absent. Attach."

Subsequent order was passed on 24th January 1899 in the following words: "Batta not paid. Dismissed for default." A subsequent petition was put in in 1900 for execution; and the judgment-debtor objected on the ground that the prior application of 1898 was barred and, consequently, the present one.

Held, that inasmuch as the order of attachment on the 4th January 1899 was passed after notice to the judgment-debtor, the same became final irrespective of the fact that the decree-holder allowed the petition to be dismissed for default afterwards.

C. V. Anantakrishna Aiyar for *P. R. Sundara Aiyar* for appellant.

M. R. Ramakrishna Aiyar for respondent.

Subrahmania Aiyar J.

1903, August 4.

} C. R. P. No. 463 of 1902.

Provincial Small Cause Courts Act, Art. 18—Suit relating to a trust.

Plaintiff and the first two defendants as trustees of a temple executed a bond to K. Plaintiff alone discharged it. Subsequently plaintiff ceased to be trustee and the 3rd and the 4th defendants were appointed as trustees. Plaintiff now sued the four defendants to have out of the trust estate the monies which he had paid out of his pocket on its behalf. The defence was that K was paid out of temple funds :--

Held that the suit related to the trust and was beyond the cognisance of the Court of Small Causes.

T. R. Venkatarama Sastri for *P. S. Sivaswami Aiyar* for petitioner.

Vedachala Aiyar for respondent.

Chief Justice

Moore J.

1903, August 6.

} S. A. No. 1352 of 1901.

Rent Sale—Cancellation—Irregularity—Onus—Publication—Time of Sale—Misjoinder.

In proceedings raising the question of the validity of sales under the Rent Recovery Act, the burden is on the landlord to show that there were no irregularities in the proceedings that led up to the sale.

*Hurro v. Mahomed*¹, *Maharaja of Burdwan v. Tarasundari*², and *Mahomed v. Abdul*³ followed.

There must be seven clear days allowed between the proclamation of sale and the date *fixed* for sale. It is no answer to this charge of irregularity to say that there were seven days before the date of *actual* sale.

1. I. L. R., 19 C. 699.

2. I. L. R., 9 C. 619.

3. I. L. R., 12 C. 67.

S. 36 of Act VIII of 1865, which makes damages alone recoverable for irregularity, is in terms confined to sale of moveable property and does not bar a suit for a declaration of the invalidity of sale of immoveable property on account of material irregularity.

Where for an arrear of rent the landlord brought the interest of the tenant in various plots comprised in his holding to sale, and different persons purchased the different plots and a suit was brought for a declaration of the invalidity of the sales on the ground that the proclamations of sale were not made seven days before the date fixed for sale :—

Held that a single suit against the various purchasers was not bad for misjoinder, as under S. 28 an action against several defendants is permitted *if in respect of the same matter*.

P. S. Sivaswami Aiyar for appellant.

V. Krishnaswami Aiyar for respondent.

<i>Benson J.</i> <i>Bhashyam Aiyangar J.</i> 1903, August 12.	}	A. No. 119 of 1901.
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Suit by reversioner—Laches—Presumption—Consideration invalid in part for alienation by widow—Form of decree.

A Hindu reversioner being entitled to bring a suit to recover properties alienated by a widow within 12 years from her death, no presumption can be drawn against him by reason of the fact that he either did not bring a suit within the widow's lifetime, or that he was guilty of laches in instituting his suit though he instituted it within the life-time of the widow.

Where the consideration for an alienation by a widow was found to be good in part and not good in part, and the latter part bore a small proportion to the former, their Lordships passed a decree declaring the alienation good on condition of the vendee paying within a certain period after the death of the widow to the reversioner that portion of the consideration which was found not good.

P. R. Sundara Aiyar and *K. Subrahmaniya Sastri* for appellant.

V. Krishnaswami Aiyar, V. Ramesam and *T. V. Vythinatha Aiyar* for respondent.

Benson J.
Bhashyam Aiyangar J. } A. S. No. 121 of 1901.
 1903, August 12.

Trust—Hereditary trust—Management by turns—Transfer of turns to another trustee—Acquiescence—Scheme for management—Adverse possession—Limitation.

Where the trusteeship of a public temple is hereditary in a Hindu family, it is open to the members in whom the trusteeship is vested, to arrange that the management should be held by each for a period in rotation.

The periods of enjoyment of the respective members may be and is usually regulated according to the shares which they would take on a partition of the family property. Such arrangements for management are, however, liable to be overridden by the courts in the exercise of their equitable jurisdiction over public trusts, in the interests of the institution which are paramount.

A scheme of management agreed to by the trustees expressly or impliedly, or observed for a length of time is as binding upon the trustees as a scheme framed by the court and can only be varied under the same conditions.

Where under a scheme of management each of several trustees acts exclusively for a period in rotation, the possession of each trustee during the period of his exclusive management is not adverse to the others but on behalf of all.

Where four out of eight trustees, each entitled to manage for a year, were excluded during the years of their management, which occurred within a period of more than twelve years and their turns were performed by another trustee:—

Held that the rights of the trustees who were excluded were barred by limitation; but that the trustee who managed in the place of the excluded trustees, could not, as against the remaining three trustees acquire a right to the turns of the excluded members by adverse possession, for so long as the right to the office was alive, the management by one could not be adverse to the others.

Where, however, the turns of the four excluded members had been performed by one trustee alone during a space of eighteen years, and such management had been acquiesced in by the remaining three trustees.

Held that the trustees should be held to have adopted by their conduct a scheme of management according to which one of them was to manage for four years besides his own turn of one year.

A mere right to management apart from the right to the office or property cannot be acquired by prescription. *Semle* :—A relinquishment of the office by one of the members of the family in favour of the others without consideration, is not illegal.

V. Krishnaswami Aiyar, P. R. Sundara Aiyar and C. V. Anantakrishna Aiyar for appellants.

M. A. Tirunarayanachariar and P. S. Sivaswami Aiyar for respondents.

Subrahmania Aiyar J.

Boddam J.

1908, August 14.

} *C. M. A. No. 132 of 1902.*

Civil Procedure Code, S. 43—Causes of action—Suit for sale of mortgaged properties—Dismissal—Suit for recovery from other than mortgagors—Splitting of claims.

The allegations in a suit for sale of mortgaged properties were that the mortgagee took possession of the properties under the mortgage, that he subsequently leased them to A who was also made a defendant in the suit, that A who obtained a sale of some of the properties from the mortgagors claimed the properties absolutely and refused to give them up. This suit was dismissed ultimately on the ground that the suit for sale was unsustainable inasmuch as the mortgage did not contain a covenant to pay and the allegations did not support a claim to recover the money.

The present suit was brought against A and his tenant on substantially the same allegations to recover the properties either on his title as usufructuary mortgagee or on his title as lessor whose title was denied by the lessee.

Held that the cause of action in the first suit was for sale against the mortgagors, though other persons in possession were also joined as being interested in the mortgaged properties, that the cause of action in the second suit was for possession against those in possession, that therefore the causes of action put forward in the two suits were different though the allegations were substantially the same in both the complaints and that the subsequent suit was not barred by S. 43, C. P. C.

V. Krishnaswami Aiyar for appellant.

P. S. Sivaswami Aiyar for respondent.

Subrahmania Aiyar J.
Boddam J.
 1903, August, 14.

} C. R. P. Nos. 459 to 462 of 1902 &
 No. 101 of 1903.

Patta—Propriety—Suit for rent—Patta accepted for a series of years—Patta only tendered for the fasli—Estoppel.

A condition in a patta that if dry lands were cultivated as wet, rent shall be paid at the rate prevailing in the case of "neighbouring nunja lands" is not improper as being uncertain.

*Venkataramanujulu Naidu v. Ramachandra Nayudu*¹ and *Ramasami v. Rajagopala*² distinguished on the ground that in a suit to settle the terms of a patta the court may have greater powers to make every condition as certain as it could be made.

Customary cesses payable to the landlord along with rent are rent within the meaning of S. 4 of the Rent Act, and interest is leviable on such cesses also under S. 37 of the Act.

A condition that the tenant should not remove crops without paying rent due under the patta and taking a receipt might be removed from the patta as improper if a summary court were considering the propriety of the patta in a suit under sections 8 or 9 of the Act.

Where patta similar to the accepted by the tenant for a long series of years was tendered for the suit fasli and the tenants met a claim for rent by the plea (advanced for the first time) that the patta tendered was improper.

Held per Subrahmania Aiyar, J. that if the tenants did not give the landlord timely notice of their objections to the patta within the fasli the tenants would be estopped from advancing the plea in a suit for rent.

Held per Boddam, J. that the facts alleged might support the plea of estoppel if the landlord had in any way altered his position to his prejudice.

P. S. Sivaswami Aiyar and *T. R. Venkatarama Sastri* for appellant.

V. Krishnaswami Aiyar for respondent.

1. I. L. R., 7 M. 150.

2. I. L. R., 11 M. 200.

Bhashyam Aiyangar J. } S. A. Nos. 92, 93 & 94 of 1902.
 Moore J. }
 1903, August 18.

*Suit to enforce acceptance of patta—Portion of holding relinquished
 —Portion relinquished neither ear-marked nor separately
 assessed—Patta for whole rent.*

A patta for the aggregate amount of rent due on the entire holding is good, even where a portion of the holding has been relinquished by the tenant, when the portion relinquished is neither ear-marked nor separately assessed, though the amount of assessment has been arrived at by a calculation of so much rent for a standard area.

Semble.—Where a tenant relinquished a separate portion of holding such as dry land in a holding consisting of dry and wet lands which were separately assessed, the patta for the rent due on the entire holding is bad.

V. Krishnaswami Aiyar for appellant.

The respondent not represented.

Bhashyam Aiyangar J. } S. A. Nos. 301 to 306 of 1901.
 Moore J. }
 1902, August 18.

*Res judicata—Decision of Revenue Court—Suit between same parties
 in Revenue Court for subsequent faslis.*

A decision of a Revenue Court will operate as *res judicata* between the same parties in a suit in a Revenue Court for a subsequent fasli.

V. Krishnaswami Aiyar for appellant.

Respondent not represented.

(See Judgments in S. A. Nos. 1248 to 1271 of 1899 which are to the same effect—*Ed.*)

RECENT CASES.

Boddam J.
Bhashyam Aiyangar J. } C. M. S. A. No. 23 of 1903.
1903, Sep. 2.

*Civil Procedure Code, Ss. 208, 259—Decree for moveable property—
Money value—No alternative to judgment-debtor—Decree.*

Where in a suit brought to recover an elephant, the decree directed "that the defendant do deliver up to the plaintiff the elephant in dispute or pay its value, Rs. 800 with interest, etc."

Held, that the decree gave no option to the judgment-debtor to give either the elephant or the money.

It is only when, after proceeding under S. 259, delivery of the specific moveable cannot be had, money is payable to the decree-holder.

P. R. Sundara Aiyar for appellant.

C. Krishnan for respondent.

Boddam J.
Bhashyam Aiyangar J. } C. M. S. A. No. 24 of 1903.
1903, Sep. 4.

Appeal—Order releasing a surety—Civil Procedure Code, S. 336.

An appeal lies against an order passed under S. 336, C. P. C., releasing a surety and refusing execution against him.

T. R. Ramachandra Aiyar for appellant.

K. R. Krishnaswami Aiyangar for respondent.

Boddam J.
 Bhashyam Aiyangar J. } C. M. S. A. No. 16 of 1903.
 1903, Sep. 4.

Civil Procedure Code, S. 43, applicability of, to execution proceedings.

The decree-holder got a mortgage decree for the principal amount and a personal decree embodied in the same decree for interest as damages. He first executed the mortgage decree without executing the other portion of the decree for damages. Subsequently he sought to execute the unexecuted portion of the decree.

Held, that he was entitled to do so, S. 43 not applying to execution proceedings.

R. Subrahmanya Aiyar for appellant.

K. Kuppuswami Aiyar for respondent.

Boddam J.
 Bhashyam Aiyangar J. } C. M. A. No. 86 of 1902.
 1903, Sep. 4.

Notice to guardian ad litem—Want of—Irregularity—Legal representative of deceased father—Co-defendant.

It is not necessary to bring the sons of the father as legal representatives on record of their deceased father on the death of the father, when both the father and sons had been impleaded in the suit.

The want of notice to the person sought to be appointed guardian is merely an irregularity when, in fact, the minor has been effectively represented by the person so sought to be appointed in the proceedings before the Court.

Mussammat Bibi Walian v. Banke Behari Pnrshad Singh followed.

K. Srinivasa Aiyangar for appellant.

T. Rangaramanuja Chariar for respondents.

Boddam J.
 Bhashyam Aiyangar J. } S. A. No. 898 of 1901.
 1903, Sep. 5.

Co-tenants—Lessee for term of years from co-tenant—Right to partition—Partial Partition.

A village consisted of 1,000 kulis of punja lands. The village consisted of 12 shares, and all the 12 shareholders gave a lease for 28 years to the plaintiff of their whole shares in one plot of the village measuring 900 kulis, and the plaintiff was in possession of those 900 kulis. The plaintiff got from some of the co-sharers a lease of their $\frac{1}{4}$ share of the remaining 100 kulis. The plaintiff brought a suit for partition of the 100 kulis alleging that he was entitled by virtue of the lease from the co-sharers, to $\frac{1}{4}$ share in the other plot of 100 kulis, and that 1st defendant was entitled to $\frac{1}{4}$ and 2nd defendant to $\frac{1}{4}$ of this 100 kulis alone by right of certain purchase. Objection was taken to the plaintiff's suit, (1) that plaintiff being only a lessee, for a term of years, was not entitled to partition; (2) that plaintiff's suit for partition of a portion only of the village would not lie. The lower Courts dismissed the suit. Plaintiff preferred this second appeal.

Held, that (1) a lessee for a term of years from one of the co-tenants could enforce partition, which would enure only during the subsistence of the term; (2) the plaintiff being in possession of the whole of the remaining 900 kulis of the village, and defendants 1 and 2 not having any right to the possession of the 900 kulis during the period of the lease, and the only plot in which both plaintiff and defendants 1 and 2 were entitled to joint possession at date of suit being only this plot of 100 kulis, plaintiff's suit was not open to the objection of being a suit for partial partition only.

P. E. Sundara Aiyar and C. V. Anantakrishna Aiyar for appellant.

V. Krishnaswami Aiyar and K. N. Ayya for respondent.

Boddam J.
 Bhashyam Aiyangar J. } C. M. P. No. 1319 of 1902.
 1903, Sep. 11.

Criminal Procedure Code, S. 195, cl. 6—Appellate Court granting or refusing, sanction refused or granted by the 1st Court respectively—Jurisdiction of the High Court on appeal.

The District Court awarded sanction to the counter-petitioner to prosecute the petitioner under Ss. 193, 196 and 200, I. P. C., while the Sub-Court, as Court of First Instance, refused it.

Thereupon the petitioner applied to the High Court for revocation of the same. A preliminary objection was taken on behalf of the counter-petitioner that the petition being in the nature of a second appeal, does not lie to the High Court.

Held, overruling the preliminary objection that a petition lay to the High Court in cases where the findings of the courts below were not concurrent, the order of the appellate Court being merely the order that should have been passed in the first instance.

V. Krishnaswami Aiyar and K. Jagannatha Aiyar for petitioner.

T. Rangachariar and C. V. Anantakrishna Aiyar for counter-petitioner.

Boddam J.
 Bhashyam Aiyangar J. } C. R. P. No. 25 of 1903.
 1903, Sep. 11.

Charter Act, S. 15—Extraordinary jurisdiction of High Court—Power of superintendence—False statement in affidavit admissible as evidence—Penal Code, S. 199.

A person who makes a false statement dishonestly in an affidavit with a view to obtain an attachment before judgment, is guilty under S. 199 of the Penal Code.

Where it was brought to the notice of the High Court, in a connected petition that the petitioner was not guilty of any dishonesty in making a wrong statement, but honestly made it on hearsay, their Lordships set aside the sanction accorded by the Sub-Court and subsequently affirmed by the District Court, by

virtue of the power vested in them under S. 15, Charter Act, though they held that there was no ground for interference under S. 622, C. P. C.

V. Krishnaswami Aiyar and *K. Jagannatha Aiyar* for petitioner.

T. Rangachariar and *C. V. Anantakrishna Aiyar* for respondent.

<i>Boddam J.</i> <i>Bhashyam Aiyangar J.</i> 1903, Sep. 11.	}	<i>L. P. A. No. 14 of 1903.</i>
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C. P. C., Ss. 588, 595, "final"—Letters Patent, S. 15—Appeal.

The Sub-Judge dismissed an appeal for default and also dismissed an application for re-admitting it under S. 558. An appeal from those orders to the High Court was dismissed by *Davies J.*, under S. 551. Hence this Letters Patent Appeal. On a preliminary objection that S. 588 prohibited a second appeal:—

Held, that a Letters Patent Appeal lay from the decision of single judge.

*Hurrish Chunder Chowdhry v. Kalisunderi Debi*¹; *Sabhpathi Chetty v. Narayanasami Chetty*² referred to.

The word "final" in the last clause of S. 588 means only that there is no second appeal to a higher authority and not that the court which passed an order in an appeal under S. 588 could not review it or revise its own order, or that there can be no appeal to the Privy Council if that would otherwise lie.

P. S. Sivaswami Aiyar and *C. V. Krishnaswami Aiyar* for appellant.

T. Natesa Aiyar for respondent.

1. I. L. B., 9 C. 482.

2. I. L. R., 25 M. 555.

Boddam J.
 Bhashyam Aiyangar J. } Referred Case No. 4 of 1903.
 1903, Sep. 14.

Suit by anandravans for money due according to a karar—Interest in joint family property—Provincial Small Cause Courts Act, Sch. II, Art. 11 and 38—Not cognizable by a Small Cause Court.

A suit by the junior members of a tarwad against their karnavan in virtue of their right to participate in the joint produce of the family property in accordance with the terms of a family karar is not a suit relating to maintenance within the meaning of Art. 38 of the 2nd schedule of Act IX of 1887, but falls within the purview of Art. 11 of the same schedule and is, therefore, not cognizable by a Small Cause Court.

Neither side represented.

Boddam J.
 Bhashyam Aiyangar J. } C. M. A. No. 60 of 1903.
 1903, Sep. 14.

Civil Procedure Code, S. 244, cl. C—Execution of decree for costs—Decree in favor of the head of a Mutt—Suit to declare head of a Mutt not properly appointed.

A suit was brought for a declaration that the defendant was not lawfully appointed as jeer and that a proper jeer should be appointed. The court held that such a suit would not lie and dismissed the suits with costs of the defendant without pronouncing upon the validity of his appointment. Soon after that person died without having executed the decree for costs. The next jeer also died. In the course of a suit for the appointment of a successor, a receiver was appointed to take charge of the mutt properties. He sought to execute the decree for costs as the legal representative of the decree-holder and was allowed to execute the decree. Hence this appeal. It was contended that the Receiver could not execute the decree for costs as the suit was not in the interests of the Mutt, and as there was no allegation that the costs of the suit were defrayed out of the Mutt funds.

Held, that the Receiver could execute the decree as legal representative of the defendant, for the purpose of recovering the costs.

Even assuming that the costs of the suit were not defrayed out of funds belonging to the Mutt, the Receiver can execute the decree for costs, the sons or other personal heirs of the defendant being at perfect liberty to recover it from the Receiver.

P. S. Sivaswami Aiyar for appellant.

T. V. Seshagiri Aiyar for respondent.

<i>Boddam J.</i> <i>Bhashyam Aiyangar J.</i> 1903, Sep. 14.	}	<i>C. M. A. No. 77 of 1903.</i>
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Court fee—Suit for cancellation of deed and delivery—Valuation.

In a suit for cancellation and delivery of deed, the plaintiff is at liberty to value the claim in any way he likes, and the court has no power to revise the valuation put upon the claim by the plaintiff, in the absence of any rule framed by the High Court for the purpose.

*Guruvajamma v. Venkatakrishnama Chetti*¹ ; *Samiya Mavali v. Minammal*² followed.

T. Rangachariar for

<i>Boddam J.</i> <i>Bhashyam Aiyangar J.</i> 1903, Sep. 14.	}	<i>S. A. No. 190 of 1902.</i>
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Transfer of Property Act—Sale of another's land—Giving lands as compensation or in compromise—Nature of transaction—Necessity of registered deed.

Where it was found that the members of a joint Hindu family sold away arbitrarily certain lands belonging to their sister and that they allowed their sister to take some of their own lands either in lieu of her lands sold by them or by way of compromise,

1. I. L. R., 24 M. 34.

2. I L. R., 23 M. 490.

Held, that the transaction is neither a sale, gift, nor exchange and need not consequently be in writing registered.

C. V. Anantakrishna Aiyar for appellant.

T. V. Seshagiri Aiyar for respondent.

<i>Subramania Aiyar J.</i> <i>Boddam J.</i> 1903, Octr. 6.	}	<i>S. A. No. 189 of 1902.</i>
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Mortgage—Oral agreement to split between mortgagee and one of mortgagor's representatives—Evidence Act, S. 92 (4).

In a suit by a mortgagee with possession to recover a moiety of the land mortgaged from the defendant (who is one out of the two representatives of the mortgagor) alleging trespass, it was pleaded that the suit land was delivered to the defendant in pursuance of an oral contract whereby the mortgagee agreed to take a half of the mortgage money from and deliver a moiety of the mortgage property to the defendant.

Held, that such a contract is not governed by the proviso in Clause (4) of S. 92 of the Evidence Act as it is not a contract to vary the terms of the original contract not being made into one only of the mortgagor's representatives and must be regarded as a first contract, and is therefore admissible in evidence.

P. S. Sivaswami Aiyar and *Ramesam* for appellant.

T. Venkatasubba Aiyar and *Narayana Sastri* for respondent.

RECENT CASES.

Offg. Chief Justice
Russell J.
1903, Oct. 9.

} C. M. S. A. No. 46 of 1902.

C. P. C., S. 310 A.—Decree-holder purchaser—Second appeal—
“Person whose immoveable property has been sold”—Tarwad
Property—Anandran.

A second appeal lies from an order under S. 310 A when the decree-holder is the purchaser.

Kamal Kutti v. Ibrayi, followed :—

An Anandran of a Malabar tarwad is a person “whose immoveable property has been sold” where the tarwad property is sold in execution of a decree against a Karnavan and is therefore entitled to apply under S. 310 A.

K Narayana Rao for appellant.

C. V. Ananthakrishna Aiyar for *P. R. Sundara Aiyar* for respondent.

Offg. Chief Justice
Russell J.
1903, Nov. 13.

} C. M. A. No. 180 of 1902.

Civil Procedure Code, Ss. 108, 147, 158—“*Ex parte*”—Adjournment by consent—Pleader applying for adjournment on adjourned date—Adjournment refused—Pleader saying “no instructions”—*Ex parte* decree.

Where an adjournment was granted at the request of one party, but with the consent of the other and both parties adduced evidence on the adjourned date, their Lordships held that the case fell under S. 157 and not under S. 158.

Where a pleader appears on behalf of a party on an adjourned date and applies for a further adjournment and on the Court refusing to grant the same says that he has no instructions to proceed and the Court proceeds to dispose of the suit, such disposal is *ex parte* and the order falls under Ch. VII, C. P. C.

*Soonderlal v. Goorprasud**, followed.

K. Jagannatha Aiyar for appellant.

V. Krishnaswami Aiyar and *N. Rajagopalachariar* for respondent.

Benson J.
1903, Oct. 13.

} C. R. P. No. 370 of 1903.

Practice—Parties—Defendants found jointly liable for quit-rent along with others not impleaded in the suit—Non-joinder—Contract Act, S. 43—Civil Procedure Code, S. 29.

Where it was found that the defendants along with certain others not impleaded in the suit were jointly liable as Shrotriendars for the quit-rent due on the whole village to the plaintiff, but the District Munsif dismissed the suit for non-joinder of the other persons.

Held that the dismissal was wrong and that the plaintiff was entitled to a decree against the impleaded persons for the rent on the finding of the Munsif as to the joint liability.

Obiter:—Even if the defendants were severally liable, the proper course is to pass a decree for the amount due by the defendants actually impleaded and not to dismiss the suit.

S. Srinivasa Aiyar for petitioner.

Benson J.
Bhashyam Aiyangar J.
Russell J.
1903, Oct. 15.

} L. P. A. No. 20 of 1903.

Civil Procedure Code, S. 525—Award—Order refusing to file award—Decree—Appeal.

An order made on an application to file an award under S. 525, C. P. C., is a decree within the meaning of the Civil Procedure Code; and an appeal lies from the order refusing to file an award.

29 I. A. 51 referred to; 3 M. 68 overruled.

R. Sivarama Aiyar for appellant.

R. Shadagopa Chariar for respondent.

Benson J.
 Bhashyam Aiyangar J. } L. P. A. No. 56 of 1902.
 Russell J.
 1903, Oct. 15.

Limitation Act, Arts. 137, 138, 139, 144 and 148.

In 1862 one V. V. permitted his servant to occupy the sites A and B.

Died leaving the house in the occupation of his son-in-law. The servant the 1st defendant, his son, the 3rd defendant, and another son of his who died subsequently. 10 or 20 years prior to suit in 1898, the 3rd defendant went out of the country leaving the 1st defendant in sole possession of the house. Decrees were obtained against the original grantor's heirs and in execution of those decrees, the plot A was sold in 1882 and plot B was sold in 1883. It did not appear whether there was any application by the purchaser and delivery of possession or whether they were at all given possession of any of the plots. The suit was brought by the plaintiff as the vendee from the purchasers for recovery of possession. The question was whether the suit was barred. The lower appellate court held that the suit was not barred and decreed possession. The second appeal was preferred by the defendants, and it came on for hearing before Mr. Justice Subrahmania Aiyar and Mr. Justice Davies. Mr. Justice Subrahmania Aiyar held that the suit was not barred while Mr. Justice Davies held that the suit was barred. Hence the letters patent appeal.

Held that either art. 137 or 138 applied and that therefore the suit was barred; that art. 144 had no application; that if the arrangement between the original alleged grantor, under which the defendants were in possession, were a mortgage or a lease, art. 148 or 139 would apply as the case may be; that the limitation began to run against plaintiff's vendor in respect of plot A in 1882 and in respect of plot B 1883.

T. V. Seshagiri Aiyar for *V. Krishnaswami Aiyar* for appellants.

T. Rangachariar for *P. R. Sunduraiyar* for respondents.

Full Bench.
Benson J.
Bhashyam Aiyangar J. } *L. P. A. No. 58 of 1902.*
Russell J.
 1903, Oct. 15.

Trustee, suit by, against co-trustee—Suit to restrain breach of trust—Public Trust—Act of majority how far binding on minority.

A trustee is entitled to sue his co-trustee to restrain breach of trust.

In the case of public trusts, the decision of the majority binds the minority only in matters of management, but not in matters which are beyond the scope of the trust.

S. A. No. 690 of 1901 followed.

T. V. Seshagiri Aiyar for *V. Krishnaswami Aiyar* for appellant.

T. Rangachariar for *P. B. Sundara Aiyar* for respondent.

Full Bench.
Benson J.
Bhashyam Aiyangar J. } *C. M. A. No. 170 of 1902.*
Russell J.
 1903, Oct. 16.

C. P. C., Ss. 278, 280, 281 and 335—"Possession"—Physical and constructive.

The words "possess" and "possession" in the claim sections of the Civil Procedure Code include both physical and constructive possession, and consequently claims can be made under those sections in respect of debts and other intangible property.

C. V. Anantakrishna Aiyar for *P. B. Sundara Aiyar* for appellant.

T. B. Ramachandra Aiyar and *K. R. Subrahmanya Sastri* for respondent.

Benson J.
 Bhashyam Aiyangar J. } C. R. P. Nos. 492 and 493 of 1902.
 Russell J.
 1903, Oct. 16.

Rent Recovery Act, Ss. 7, 9 and 72—Suit for rent—Tender of patta after judgment, necessity of.

A fresh tender of patta after judgment is not necessary as a preliminary to a suit for rent, if the patta already tendered before the suit under S. 9 was one which the tenant was bound to accept or one which the court accepted as correct ; and in cases where the Judgment modifies the patta, a mere demand to execute a muchilika which is refused is enough to entitle the landlord to sue for rent.

M. R. Ramakrishna Aiyar for petitioner in both cases.

N. Raiagopalachariar for respondent in C. R. P. No. 492.

V. Ramesam for respondent in C. R. P. No. 493.

Benson J.
 Bhashyam Aiyangar J. } L. P. A. Nos. 42 and 43 of 1903
 Russell J. } Criminal.
 1903, Oct. 16.

Letters Patent, S. 15—Judgment—Criminal Trial—Appeal.

A Judgment of a single Judge of the High Court dismissing a criminal appeal under S. 421 is a judgment in a criminal trial, and therefore no appeal lies from the judgment under the letters patent.

V. C. Seshachariar for appellants.

Benson J.
Bhashyam Aiyangar J.
Russell J.
 1903, Oct. 16.

} *S. A. No. 1383 of 1901.*

Document, construction of—Pro-note—Act I of 1879, S. 34.

Held that a document which ran in the following words—
 “In addition to Rs. 115 already received Rs. 385 is also required.
 Please send it by The amount will be returned with interest
 at 12 per cent. without delay,” is not a promissory note within
 the meaning of S. 34 of Act I of 1879.

Channamma v. Ayyanna,¹ overruled.

C. R. P. No. 247 of 1896 (I. L. R. 23 M. 156 Foot-note) and
 I. L. R., 13 B. 669 followed.

J. L. Rozario for appellant.

B. Govindan Nambiyar for respondent.

Benson J.
Bhashyam Aiyangar J.

} *A. S. No. 69 of 1901 and C. M. A.*
 Nos. 105 and 109 of 1902.

*Civil Procedure Code, S. 257A—Sanction of Court—Absence of
 sanction, effect of—Alteration of decree—Entry of satisfaction
 —Limitation—Res judicata—Attachment—Effect of dismissal
 of execution petition on attachment—Order upon a preliminary
 issue, effect of.*

A decree of court cannot be subsequently altered except
 under Ss. 206 or 210.

An agreement between the decree-holder and the judgment-
 debtor securing some additional benefit to the former does not
 become a part of the decree by sanction of court, but can only
 be enforced in a separate suit.

Without sanction of court, such agreement is void and cannot
 be enforced either in execution or in a separate suit. To hold

that the section does not make it void for a separate suit is to defeat the very policy of the section which is intended to protect judgment-debtors from being coerced by threat of execution proceedings to submit to unconscionable extortion by the decree-holders ; and is also opposed to the clear terms of the section.

A sanctioned agreement to give time for the payment of the judgment debt operates as a stay of execution under S. 244.

An agreement which adjusts the decree is enforceable in a separate suit, even though sanction has not been obtained, if it does not secure the payment of any sum more than the amount payable under the decree.

If the sanctioned agreement makes any sums payable towards the decree in any particular manner, and payments are so made, such payment should be certified to the court under S. 258 ; otherwise such payments will not be recognised in subsequent execution proceedings. The judgment-debtor can only sue for breach of contract, if such payments were not given credit for.

An application for sanction under S. 257A is not a step in aid of execution and cannot furnish a fresh starting point of limitation for execution.

Where after execution was barred, applications for execution had been put in and granted after notice to the parties, and even moneys of the judgment-debtor in court had been paid to the decree-holder, *held* that the judgment-debtor was debarred from raising the question of limitation.

An attachment made after notice to judgment-debtor is not discharged by the mere fact of the application for execution being subsequently dismissed for default of prosecution.

A determination of one of the questions of law which may have to be decided before execution can be granted, is not an order in execution and cannot operate as *res judicata* unless it has been followed up by an order in execution. Nor need such a determination in the absence of an order following it be appealed against.

Where an execution petition is withdrawn after the determination of one of the preliminary questions arising in the case such determination is no more than the expression of the Judge's opinion and is of no effect for any purpose.

P. R. Sunlara Aiyar for *Sankaran Nair* and *T. R. Venkatarama Sastri* for appellant in A. S. No. 69.

Nurasimhaiyengar for respondent in A. S. No. 69.

S. Subramania Aiyar for appellant in C. M. A. No. 105 & 109.

P. R. Sundara Aiyar for respondents.

<p><i>Boddam J.</i> <i>Bhashyam Aiyangar J.</i> 1903, Sep. 8.</p>	}	<p><i>S. A. Nos. 110 & 112 of 1902.</i></p>
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Res judicata—One defendant absent—Interest in suit—Issue—Effect of decision.

Where a defendant is not interested in the result of the suit so far as its immediate object matter is concerned, the fact that he is interested in the decision of an issue therein does not make it incumbent on him to appear and contest the suit; and the decision on the issue is not *res judicata* in another suit where the same issue may be raised.

A purchaser in execution of a decree against one of four brothers of his share in certain specified properties brought a suit to recover it. The present plaintiff who was one of the brothers did not appear. The other two set up a partition and claimed the properties as having fallen to their share. One of the issues was whether the brothers were divided. It was held that they were divided and a decree was passed for a fourth of the properties. On an attachment of the property in the hands of the absentee defendant, he raised the same plea of division and claimed the property as his own. *Held* that it was not *res judicata* inasmuch as according to his case he was in no way interested in the result of the other suit and could not have contested the issue.

P. S. Sivaswami Aiyar and *T. R. Venkatarama Sastri* for appellant.

V. Krishnaswami Aiyar for respondent.

Benson J.
Bhashyam Aiyangar J.
Russell J.
 1903, Sep. 14.

} *Reference Cases 1 and 13 of 1903*
 } *under Stamp Act II of 1899.*

Stamp—Kanom—Renewal fee—Transfer.

The questions referred in these cases were (1). Whether the Malabar kanom is to be stamped as a lease, or as a mortgage, (2). Whether when a renewed kanom is given, for the amount of the original kanom, the *Jenmi* receiving some renewal fees as present, the amount of the renewal fee (present) is to be added to the consideration and stamp paid thereon also, and (3). Whether a transfer of a kanom by the Kanomdar, should be stamped, as a transfer of lease (*ad valorem* on the consideration for the transfer), or only as a transfer of a mortgage (in which case the transfer deed is subject only to a maximum stamp of Rs. 5) when the kanomdar transfers his whole interest in the land, kanom and improvements.

Held, that (1) the Kanom is to be stamped only as a mortgage, (2) that renewal fees or presents, should be added to the amount of kanom, and stamp paid on the total amount, and that (3) the transfer deed should be stamped only as a transfer of mortgage.

The Government Pleader for the Board of Revenue.

C. V. Anantakrishna Aiyar and *M. R. Sankara Aiyar* for the parties to the document.

Benson J.
Russell J.
 1903, Oct. 23.

} *L. P. A. No. 187 of 1903.*

Letters Patent, Art. 15—Judgment—Dismissal of C. R. P. under S. 25.

Where a Judge of the High Court simply dismisses a petition under S. 25 of the Provincial Small Cause Act without assigning any reasons, such dismissal is not a judgment whether made before or after notice, within the meaning of S. 15 of the Letters Patent, and no appeal lies from such order.

T. Richmond for appellant.

C. Krishnan for respondent.

[*Vide* L. P. A. 18 of 1903 *Contra—Ed.*]

Officiating Chief Justice
Bhashyam Aiyangar J. } *S. A. No. 242 of 1902.*
 1903, Oct. 27.

Limitation Act, Arts. 18, 120—Act IX of 1871 Art. 20—Land Acquisition Act S. 17, Cl. 1—Refusal to make an award on the ground that the land belongs to Government—Suit for compensation.

The Government after taking all the preliminaries under Ss. 6 and 9 of the Land Acquisition Act took possession of the lands under S. 17, Cl. 1. They afterwards refused to pass an award under S. 11 for compensation on the ground that the land belonged to themselves and communicated the refusal to the plaintiff's owners of the land. The plaintiffs brought a suit for possession of the lands and in the alternative for damages just after the expiry of a year from the date of the communication of the order refusing to make an award. Both the lower courts found the land to belong to plaintiffs, but vested in the Government under the Land Acquisition Act. As to the alternative prayer they were of opinion that the article applicable to the suit was Art. 18 of the Limitation Act and was therefore barred.

Held, that the article applicable was 120 and not Art. 18.

V. Krishnaswami Aiyar and K. Subrahmania Sastri for appellants.

The Public Prosecutor (E. B. Powell) for respondents.

Officiating Chief Justice,
Bhashyam Aiyangar J. } *S. A. No. 254 of 1902.*
 1903, Nov. 3.

Legal Practitioners' Act, S. 28—Pro-note taken by pleader for advances in the cause—Agreement not filed—Pro-note invalid—Right to recover money advanced.

Held, that a pro-note taken by a pleader for advances made in the cause for the client is an agreement within the meaning of S. 28 of the Legal Practitioners' Act and is invalid, and un-enforceable if not filed in court. There is nothing to restrict the provisions of S. 28 to mere agreements which stipulate for more than the

amount spent or for more than the regulation fee. But none the less a pleader who advances money for his client is entitled to enforce his lien and recover it as money advanced, irrespective of any invalid agreement, such as a pronote, which he might have entered into.

P. S. Sivaswami Aiyar for appellant.

V. Krishnaswami Aiyar for respondent.

Officiating Chief Justice
Bhashyam Aiyangar J. } *A. No. 11 of 1902.*
 1903, Nov. 3.

Contract—Fraud—Sale of goods—Ratification by getting a decree for purchase money—Subsequent suit for goods delivered.

Where a party finds that he had been made to enter into a contract for sale of goods by reason of some fraud on the part of the vendee before he obtains a decree for the price of goods and yet allows a decree to be passed in his favour, he cannot afterwards sue to set aside the contract and for the re-delivery either from the purchaser himself or from this latter's assignee as the decree obtained in the former suit is in substance a ratification of the contract.

The Advocate-General (J. E. P. Wallis) and *Barclay, Orr and David* for appellant.

Dr. Swaminathan for respondent.

Bhashyam Aiyangar J. } *C. R. P. No. 62 of 1903.*
 1903, Nov. 7.

C. P. C., Ss. 460-622—Withdrawal of suit of minor by next friend—Next friend not acting in the interests of minor—Want of sanction—Review, rejection of—Revision by the same next friend.

When it is apparent to the Court that the next friend of a minor acts prejudicially to the minor, it is the duty of the Court

to see that the next friend is discharged and another appointed in his place. It should stay the suit until another next friend is appointed.

Where a next friend of a minor withdrew a suit for partition instituted by him, without obtaining leave to file a fresh suit, and on application being subsequently made for a review on the ground that the guardian did not consent for a withdrawal, the Judge refused to grant it.

Held, that the Judge failed to exercise a jurisdiction vested in him in not granting the review.

I. L. R., 29 C. 785 followed.

The withdrawal was bad for want of sanction under S. 462.

C. Ramachandra Rao Saheb and *M. R. Sankara Aiyar* for petitioner.

P. S. Sivaswami Aiyar for respondent.

<i>Bhashyam Aiyangar J.</i> 1903, Nov. 9.	}	<i>C. R. P. No. 115 of 1903.</i>
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Limitation Act, S. 20, applicability of, to execution proceedings.

S. 20 of the Limitation Act has no application to execution proceedings, and consequently an application for execution more than 3 years after the previous application, though a part payment has been made towards the decree amount within 3 years of the application is barred.

R. Shadagopachariar for petitioner.

C. Ramachandra Rao Saheb for respondent.

Bhashyam Aiyangar J. } *C. R. P. No. 445 of 1902.*
 1903, Nov. 9.

C. P. C., S. 203—Small Cause Court Judgment.

Held, that a Small Cause judgment which merely said after recording the questions for determination "I find in the negative" is not a judgment in accordance with law.

T. V. Seshagiri Aiyar for petitioner.

C. N. Nammiah Chetti for respondent.

Boddam J. } *C. M. S. A. No. 33 of 1903.*
Russell J.
 1903, Nov. 13.

C. P. C., S. 544—Execution application—Appeal by one judgment-debtor—Munsif's order allowing application reversed as barred even as against judgment-debtors other than appellants—Jurisdiction to set aside District Judge's order in the absence of parties affected—Second Appeal—Other judgment-debtors not parties—Interest several.

The District Munsif allowed execution as against all. One of the judgment-debtors who was only made liable for costs appealed against the order of the District Munsif. The District Judge rejected the execution application as barred by limitation not only as against the appellant judgment-debtor but as against all. The judgment-debtors were severally liable under the decree, and the appellant judgment-debtor was only liable as to costs.

Held, on second appeal in which only the appellant in the lower court was made party respondent, that the District Judge acted *ultra vires* in rejecting the execution application even as against people who did not appeal and that the District Munsif's order as against them should be restored even though the others were not parties to the second appeal.

V. Krishnaswami Aiyar for appellant.

K. Srinivasa Aiyangar for respondent.

Boddam J.

1903, Nov. 16.

} C. R. P. No. 478 of 1902.

C. P. C., S. 622—*Suit for property under sale.*

Plaintiffs sued for recovery of certain moveables belonging to one S. deceased. They claimed under a sale deed from the 1st defendant, heir of S. Defendants 2 to 4 were in possession of the properties claiming them under an alleged will of S. in their favor. The District Munsif found the will not genuine and on the second defendant putting in a petition into court that he had no objection for a decree being passed in plaintiffs' favour gave a decree for possession against defendants 2 to 4, and exonerating 1st defendant without going into the question of consideration. 3rd defendant appealed. The District Judge found the will set up by the 3rd defendant was not genuine but dismissed the plaintiffs' suit on the ground that there was no consideration for the sale by 1st defendant to plaintiff. On revision under S. 622:—

Held, that the District Munsiff acted illegally and with material irregularity in the exercise of his jurisdiction in reversing the Munsif's decree on the appeal by the 3rd defendant whose title has been found against by both the Courts.

V. Krishnaswami Aiyar and S. Srinivasa Aiyar for petitioner.
C. V. Anantkrishna Aiyar for respondent.

Benson J.

Bhashyam Aiyangar J.

Russell J.

1903, Nov. 17.

} S. A. No. 673 of 1892.

Rent Recovery Act, S. 2, 4, 16, 38—Proceedings under the Act—Limitation—Starting point.

Summary proceedings under the Rent Recovery Act VIII of 1865 should be taken within one year from the date on which the rent was due according to the patta, whether the patta had been tendered on that date or not.

I. L. R., 13 M. 463 overruled and I. L. R., 12 M. 465 approved.

T. R. Venkatramasastry for P. S. Sivaswami Aiyar for appellant.

V. C. Seshachariar for respondent.

Benson J.
 Bhashyam Aiyangar J.
 Russell J.
 1903, Nov. 17.

} C. M. A. No. 117 of 1903.

Civil Procedure Code, S. 287, 244—Proclamation—Terms, settlement of—Order—Appeal.

The determination of the terms of a proclamation, under S. 287, C. P. C., such as the value of the land, the lots in which the property should be sold, etc., is not a judicial order and cannot be appealed against as an order under S. 244.

I. L. R., 23 M. 568 overruled and I. L. R., 30 C. 617 dissented from.

K. Balamukundu Aiyar for appellants.

C. R. Thiruvenkatachariar for respondent.

Benson J.
 Bhashyam Aiyangar J.
 Russell J.
 1903, Nov. 17.

} S. A. No. 283 of 1890.

Mortgage—Usufructuary mortgage—Covenant to pay—Construction—Suit for sale.

A mortgage ran in these terms :—

“ அப்பால் பவனூ பங்குனிச் சமீபத்தில் மேல் கண்ட து உட்காரும் செலுத்திவித்து யெங்கள் நிலங்களை திருப்பிகொள்வோமாகவும். ஐ. வாயிதாவில் துறை செலுத்தி நிலங்களை திருப்பிகொள்ளாதவரையில் யெந்த ஒரு பங்குனிச் சமீபத்தில் ஐ. து உட்காரும் சரிவரச் செலுத்திவிடப்போமோ அப்போது யெங்களுடைய நிலங்களை யெங்கள் வசம் விட்டுவிடுவோமாகவும்—”

Held, that there was a covenant to pay and redeem on the specified date and that the mortgage was a combination of simple and usufructuary mortgages and the suit for sale was therefore sustainable.

P. S. Sivaswami Aiyar for respondent.

S. Srinivasa Aiyangar for appellants.

Officiating Chief Justice,
Bhashyam Aiyangar J. } *A. No. 232 of 1901.*
 1903, Oct. 27.

Place of Contract—Civil Procedure Code, S. 17, Cl. c—Contract Act, S. 212—Jurisdiction.

A contract concluded by correspondence is complete as soon as the letter of acceptance is posted, subject to the right of revocation by the acceptor before the acceptance is received by the proposer; and the place where the acceptance is so posted is where the contract is made.

Clause 3 of S. 17, C. P. C., is inapplicable to a suit for damages for the negligence of an agent in the performance of his duty, inasmuch as they are not money payable under the contract at any particular place; and such damages are not debts in respect of which the maxim that the debtor is bound to seek the creditor will apply.

The contract of agency for sale of goods having been entered into between the plaintiff, a Bellary merchant and the defendant, a Madras Commission Agent, by a letter of acceptance which was posted at Madras but received in Bellary, this suit was filed in Bellary for recovery of damages for neglect to sell the goods at the best market price available. *Held*, that Clause c of the explanation to S. 17 was inapplicable, that the cause of action arose at Madras under the two other clauses and that the Bellary Court had no jurisdiction.

P. S. Sivaswami Aiyar, P. R. Sundara Aiyar and Sundaram Sastri and Kumarasawmi for appellants.

T. V. Seshagiri Aiyar and K. Balamukunda Aiyar for 2nd and 3rd respondents.

RECENT CASES.

Offg. Chief Justice. }
1903, Sept. 28. } Cr. R. C. No. 202 of 1903.

Indian Penal Code—Defamation—Exception—Privilege—Bona fides—Onus of proof.

In prosecutions under the Indian Penal Code for defamation, there is no privileged occasion. When the defamation is admitted and an exception is pleaded, it is for the accused to prove that he comes within an exception; and *bona fides* which is one of the conditions of the exception is also for him to prove.

T. R.^a Ramachandra Aiyar for the petitioner

K. R. Subramania Sastri for complainant.

Benson J.
Bhashyam Aiyangar J. }
Russell J. } S. A. No. 283 of 1902.
1903, Nov. 17.

Rent Recovery Act, S. 40—Attachment—Sale—Suit in Civil Court for injunction.

When property has been attached under the Rent Recovery Act for the recovery of arrears of rent a suit may be brought in the Civil Court to have it declared that the attachment is invalid and to stop the sale.

V. Krishnaswami Aiyar and M. R. Ramakrishna Aiyar for appellant.

K. N. Aiya Aiyar for respondent.

Offg. Chief Justice. }
1903, Nov. 18. } C. B. P 328 of 1903.

Specific performance—Dismissal of suit—Suit for return of earnest money paid—Specific Relief Act, S. 29—Civil Procedure Code, S. 43—Limitation—Starting point.

A suit for specific performance of a contract to renew a *kanom* was dismissed, because a *melkanomdar* who had no notice of

this contract to renew was allowed to redeem and the kanomdar in a subsequent suit claimed the return of renewal money paid.

Held that the suit was not barred either by S. 29 of the Specific Relief Act or by S. 43 Civil Procedure Code and that the cause of action arose on the date of the final disposal by the High Court of the suit for specific performance.

K. R. Subramania Sastri for petitioner.

Govindan Nambiyar for *Ryru Nambiyar* for respondent.

Offg. Chief Justice.

1903, Nov. 24.

} C. R. P. No. 326 of 1903.

Mortgagor and Mortgagee—Increase of revenue—Who to pay.

Where a mortgage provided that the mortgagee should pay himself a certain amount for revenue due to the Government and interest, and the balance should be paid over to the mortgagor and the Government subsequently increased the revenue demand.

Held that the mortgagor was bound to meet the demand and that the mortgagee was bound to pay only the balance after deducting such increased revenue.

K. P. Govinda Menon for petitioner.

T. R. Krishnasami Aiyar for *K. R. Subramania Sastri* for respondent.

Benson J.

Bhashyam Aiyangar J.

Russell J.

1903, Dec. 7.

} S. A. No. 167 of 1902.

Rent Recovery Act, S. 12—Relinquishment—Intermediate landholder.

An intermediate land-holder is not a tenant of the Zemindar or other superior landlord and cannot relinquish his right in the lands to his superior under S. 12 of the Rent Recovery Act.

I. L. R., 7 M. 580; Ibid 262; I. L. R., 10 M. 229; and I. L. R., 8 M. 196 overruled.

P. R. Sundara Aiyar for appellant.

V. Krishnaswami Aiyar for respondent.

Offg. Chief Justice.
Boddam J.
1908, Dec. 11. } S. A. No. 297 of 1902.

Benamidar—Mortgage bond—Right to sue.

A benamidar is a trustee for the real owner and can maintain a suit in his own name. See S. 82 of the Trusts Act. The procedure as to the addition of parties is that prescribed by S. 437, C. P. C.

The person in whose name a mortgage bond stood for the benefit of other persons died. His legal representative after obtaining a succession certificate instituted a suit on the bond. The debtor having taken the plea that the benamidar was not entitled to sue, and much less his representative:—

Held—that the benamidar could sue and also his representative, though the plaintiff might have to hold the money when recovered in trust for the real owner.

Ramesam for appellant.

J. G. Kernan and P. Nagabhushanam for respondents.

Offg. Chief Justice,
Boddam J.
1908, Dec. } Cr. R. C. No. 404 of 1902.

Indian Penal Code—Lawful custody, escape from—Debtor—Arrest—Custody of officer continued under order of Court.

An officer of Court arresting a judgment-debtor in execution of a decree should produce the debtor before the Court which ordered his arrest with all convenient speed. The Court has, thereafter, no power to leave him in the custody of the officer but must commit him to Civil Jail. If the Court gives the debtor time to pay the debt and leaves him in the custody of the officer, such custody is unlawful and to escape from it is no offence under the Penal Code.

V. Viswanatha Sastri for petitioner.

[When the Court is making an inquiry under S. 387-A(2) it may leave the arrested debtor in the custody of an officer. See Cl. 3 of that section. Then such custody is lawful and escape from it will be an offence.—*Ed.*]

Benson J.
Bhashyam Aiyangar J. } *S. A. No. 49 of 1902.*
Russell J.
 1903, Nov. 16.

Hindu Law—Decree against father—Suit against son subsequently—Limitation.

A decree against a Hindu father for money creates a debt of record against the son and a suit to recover the debt may be maintained against the son within 6 years from the date of the decree or the time fixed for payment in such decree.

Per Bhashyam Aiyangar J :—

1. The suit is not in such cases upon the previous judgment ; and in this case especially it is not a suit upon judgment because the judgment was of the Presidency Small Cause Court, and a suit upon judgment is expressly prohibited by the Presidency Small Cause Act.

2. The suit is to recover a debt of record against the father, subject to the exceptions as to liability of son laid down by the Hindu Law.

3. Where a decree is passed against the father, the decree-holder may (1) execute the decree against assets inherited by the son from the father, (2) or bring a suit to recover the decree debt, or (3) bring a suit upon the original cause of action if binding on the son.

In (2) illegality or immorality of the debt may alone be pleaded. In (3) the action will proceed as if there had been no prior suit against the father.

4. As in the case of joint debtors you can obtain several decrees though you can recover but once.

5. The period of limitation is the same against both. If the debt or after decree execution is barred against the father, it cannot be enforced against the son.

6. The liability of the son is also one on contract though the same is limited by law.

7. The limitation for a suit to recover the debt of record against the father is six years under Art. 120 of Limitation Act.

Joseph Satya Nadar for appellant.

R. Subrahmania Aiyar for respondent.

